A COMMENTARY ON CANON LAW

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Augustine

A COMMENTARY ON THE NEW CODE OF CANON LAW

By THE REV. P. CHAS. AUGUSTINE, O.S.B., D.D.
Professor of Canon Law

VOLUME I

Introduction and General Rules (can. 1-86)

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FOREWORD TO THE FOURTH EDITION

The three editions of this volume which followed one another since 1918 with rather unexpected rapidity were, on the whole, received kindly and welcomed by the reverend clergy. Criticisms, of course, have not been wanting. To these we pay due attention in this new edition. To all, friends as well as critics, whose censures we welcome when just and made in a charitable manner, we here wish to express our sincere thanks. Those who sent us letters of congratulation which we may have neglected to answer are also included in this expression of gratitude.

On March 19th, 1904 *Pius X* issued a Motu Proprio, in which he announced to the Catholic world that he was about to undertake the codification of all the laws that had emanated from the Church either in form of collections or loose and disconnected legislative decrees. This had been a *desideratum* of the Fathers of the Vatican Council and of many individual prelates. A Commission of Cardinals was established, over which the Pope himself presided. This Commission was assisted by consultors taken from canonists and theologians who belonged to the secular as well as the regular clergy. The results of their labors were submitted to the Cardinals, five of whom formed, as it were, the executive committee. This increased the number of consultors to twenty-five. Although death caused a change in the ranks of the Cardinals and consultors, yet amid all vicissitudes the famous cannonist, now Cardinal *Pietro Gasparri,* remained at work, sacrificing his time and even his health, in the promotion of an almost superhuman task. The episcopate,

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the superiors of religious orders and congregations, members and faculties of Catholic universities were invited to give their views and express their desires. Nov. 13th, 1904, regular meetings were begun and the materials sifted, examined, and classified. The materials were taken from the Corpus Iuris Canonici, the Tridentine Council, papal constitutions, and decrees or decisions of the Roman Congregations. As the edition of Cardinal Gasparri shows, this programme was adhered to strictly and almost exclusively. The only exceptions are a few entirely new rules, which, however, are based more or less on recent Roman practice. At the meetings the different *vota* or proposals were submitted to a thorough discussion, which was repeated as the importance of the subject required, and finally put to a vote. The sketch decided on by the Commission was then forwarded to the consultors and their observation again submitted to the special Committee of Cardinals. The work went on silently, and the secret to which all were solemnly bound, made it almost impossible for newspapers to get correct information. What leaked out came chiefly from the Ordinaries who had received copies of the preliminary code made up of several books for discussion at their meetings.[1]

Even after the war had stirred Europe, and the occupant of the papal throne had changed, the cheerful spirit of the Head of the Commission, who now became Cardinal Secretary of State, did not change. Two years after the death of Pius X, at whose behest the codification had been undertaken and during whose pontificate the matter had been "*digested*," his successor was able to announce to the Cardinals assembled in secret consistory that the Code was ready. This was on Dec. 4th, 1916.

1 *A. Ap. S.*, VIII, 466 ff.

When Pope *Benedict XV* made this announcement he compared Pius X to the great lawgivers, Innocent III, Honorius III, and Gregory IX. This compliment was fully deserved.[2] The Code was *promulgated* on Pentecost day, May 27th, 1917, and declared to be in force from May 19th, 1918.

That the Vatican and the Church at large feel great satisfaction after the promulgation of this monumental work is only natural. It was a colossal undertaking to gather the scattered sources into one organic and logically well constructed work, to combine the *nova et vetera* so as to form one uniform Code which reflects the traditional and perennial life of the Church adapted to modern circumstances and exigencies, breathing a spirit of toleration and accommodation.[3] The canonist is grateful and in his heart will muse over Virgil's verse *"Redeunt Saturnia regna,"* because, after a long period of relative neglect, his office again assumes its former importance. For, although the advantages of the New Code are undeniable, a commentary is necessary to grasp the full meaning of the text.

This calls for an observation which is alluded to in the decree of the *Congregatio Semin. et Stud.* of Aug. 7th, 1917, and in a letter of Benedict XV to the Patriarch of Venice.[4] Both documents recommend and prescribe to the teacher of Canon Law to explain the New Code, not only synthetically, but also analytically, by closely following the order and text itself. The decree also calls for a *historical survey,* not indeed of every canon,

2 This sketch is chiefly drawn from the *Praefatio* of Card. Gasparri's edition of the *C. I. C.* (4° ed., 1917); from the *Eccl. Review, the Archiv fiir Kirchenrecht,* 1915, 1916, 1917, etc; Stutz, *Der Geist des Codex Juris Canonici,* 1918, pp. 3–53, describes the history of Codification.

3 Stutz, *l.c.,* p. 51, a non-Catholic canonist of great merit, gives full credit to the Code.

4 July 16th, 1017; both in *A. Ap. S.,* ix, 381 f.; 439.

but *of every institutum juridicum, i. e.,* a determined and defined topic, such as, for instance, election, benefices, property, penalties. No doubt, the S. Congregation thereby intended to recommend the *lectura textus* or reading of the text in the order of the Code, as was the practice in the great centers of canonical learning in the Middle Ages with regard to civil and canon Law. It is quite intelligible that a continuous commentary should be conducive to the realization of the method prescribed. Wherefore some historical notes were either prefixed or interspersed in our Commentary. We are aware that this method is not hailed by every school. Thus a complete and clear separation of the so-called dogmatic from the historical treatment of Canon Law has been loudly demanded. However, although it is undeniable that such a method would deepen study and knowledge, yet it would be practically impossible even at universities, unless an extended space of time were alloted to this branch.

If this is true in schools for which the reading of the text, *schola textus,* is prescribed, it holds even more emphatically for *seminaries,* where Canon Law is generally taught in the form of "institutions," a method derived from the so-called *mos docendi gallicus.* This consists or should now consist of an introduction containing a historical review of the sources and literature, followed by a systematic exposition of the main subjects as treated in the Code. The division of the Code may serve as a skeleton, and each book should contain the chief canonical tracts as outlined in the titles. Thereby the strictly moral, liturgical and pastoral topics may be assigned to these respective branches. Such a treatment is not forbidden by the above named decree, which does not legislate for seminaries. May this Commentary contribute to a deeper study and understanding of the Code.

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THE NEW CODE OF CANON LAW

PART I
INTRODUCTION

CHAPTER I

NAME AND DEFINITION OF LAW IN GENERAL AND CANON LAW IN PARTICULAR

The Latin word *jus* (from *jurare,* to swear, or *jussum,* command) has a double meaning or sense: a) subjectively, it signifies *right,* or "the moral power to have, to do, or to require something from another (*facultas moralis inviolabilis aliquid habendi, agendi, exigendi*), as we say to give to every one his due (*suum cuique*); b) in the *objective* sense, *jus* denotes norm or *law* either in the singular or plural (complex of laws), for instance, the law of celibacy, civil law, canon law. This latter meaning is attached to the "eternal law," since "the very idea of government of things in God the Ruler of the universe has the nature of a law,"[1] and every law, divine or human, is but an irradiance from the eternal law, as all human laws bear the character of laws only in as far as they approach, more or less, this prototype.

Canon Law (*jus canonicum,* derived from the Greek κάνων, *i. e.* norm or rule), as a technical term occurs since

1 *S. Theol.,* I-II, q. 91, a. 1 f.

the twelfth century,[2] this nomenclature being exclusively reserved for the laws of the Church, whilst *lex* (*νόμος*) was applied to civil laws. Consequently the interpreters of ecclesiastical law were called *canonistae,* those of civil law, *legistae.*

DEFINITION.—Canon Law may therefore be defined as "the complex of rules which direct the exterior order of the Church to its proper end."

EXPLANATION.—a) In this definition the laws of the entire Church only are, *per se,* considered, viz. those laws which touch upon the whole body as such and emanate from the supreme authority (*jus commune*). Hence laws made for a particular portion of the Church or its members are outside our subject except in so far as they form part and parcel of the body of common law. However, since these particular or special rules need the explicit or implicit consent of the supreme lawgiver, and rest on the interpretation of law in general, it is evident that even these particular laws must, to some extent at least, be taken into consideration.

b) The *purpose* of Canon Law, as of all law properly so called, is the establishment and maintenance of *exterior order.* The Church forms an organized body which has its special and proper functions. In a certain sense, she is a body politic with a working to the outside. Hence her laws, either in regard to the hierarchic ramifications, or in relation of member to member, are concerned not directly with internal acts (*"de internis non judicat praetor"*), but with the public or exterior order of the Church at large (*finis proximus juris canonici*).

c) However, the *end* of the *Church* being mainly

2 *Summa Stephani Tornacensis, apud* Schulte, *Gesch. d. Quellen u. Lit. d. can. Rechts,* 1875, I, 29.

spiritual, *i. e.,* of the supernatural order, it is plain that Canon Law must partake of that order, and hence tend, *a potiori,* to a supernatural end. Yet, it is perfectly true what has been said above (b), that ecclesiastical laws are principally intended to maintain the public order, since the Church is not merely a supernatural and an invisible organization, but a visible body consisting of men, not of angels.

Besides the time-honored nomenclature "Canon Law," *i. e.,* the law made up chiefly of canons, there are other names: a) *jus ecclesiasticum,* inasmuch as it embraces the whole range of Church legislation contained in the canons of councils as well as in the decrees and decretals of the popes and in unwritten laws, *i. e.,* legitimate customs; b) *jus pontificium* (a term used *v. g.* by Giraldi), in as far as the supreme and chief source of Church legislation is the Sovereign Pontiff; c) *jus sacrum,* in as far as its main author is Jesus Christ and it treats of sacred persons and things.

Division of Canon Law.—a) By reason of its *origin,* Canon Law is either divine or human. *Divine* is that part of it which owes its origin to Christ or the Apostles, in as far as the latter enacted laws by divine inspiration, (which is not, however, to be identified with Scripture inspiration) or promulgated them as divine norms, *v. g.,* the hierarchy, the matter and form of the sacraments (James 5, 14), the *privilegium Paulinum. Human* is that portion of the Canon Law which has merely human authority for its existence; thus the Apostolic decrees (Acts XV) are of human authority though established by Apostles; purely human laws, too, are those passed by councils, popes, and bishops, unless, indeed, they are implicitly contained in revelation, or are merely

declarations, specifications, or modifications of divine or natural law. In the latter case they belong to the class of divine laws.

b) By reason of its *obligatory force,* either personally or territorially, Canon Law is: α) either *general,* when it binds all members of the Church, or *special,* when it binds only some members or a class of members, *e. g.,* the clergy, regulars; β) either *universal,* when it is incumbent on the entire Church as far as it is spread, or *particular,* when it affects only a certain portion of the Church, as a province or diocese. Under this heading belongs the difference between the law prevailing in the *Oriental* [3] and that binding the *Occidental* Church.

c) By reason of its *promulgation* we speak of written or unwritten law, or custom (*consuetudo*).

d) By reason of *time,* Canon Law is distributed into various epochs: α) *jus antiquum,* or old law, from the beginning of the Church up to Gratian's *Decretum* (about 1150); β) *jus novum,* or new law, up to the Tridentine Council (1545–63); *jus novissmum,* or modern law, up to our time. It remains to be seen whether the New Code will constitute a new epoch.

e) By reason of its *matter,* Canon, like civil law, may be classified into public and private law. *Public* law is concerned with the Church as a society, its government and external relations; *private* law with the rights of the members and their mutual relations.[4]

This latter distinction is rejected by most of the German canonists, *v. g.,* Philips, v. Scherer, Sägmüller, but defended by Roman authors. If we subsume under public law the constitutional law proper, together with that

[3] Concerning the laws binding this Church see the *Collectanea Prop. Fid.,* 1907, II, n. 1578; can. I of the *Codex Iuris Can.*

[4] Schenkl, *Institutiones Iuris Eccl.,* 1853, I, § 38, p. 60.

governing the Church's external relations, we believe there is nothing unwarranted in this division. Private law would then embrace chiefly the administrative portion of the laws. Whether we substitute the terms "external" and "internal" is of little importance.

CHAPTER II

THE SCIENCE OF CANON LAW AND ITS IMPORTANCE

Abstracting for a moment from the historical resources, which partly date back to the founder of the Church and partly owe their origin to the natural development of the living organism, Canon Law as a distinct *science* owes its existence and splendor chiefly to the Benedictine monk, *Gratian,* in the middle of the twelfth century, when canonists — and also legists — commenced to cultivate ecclesiastical law systematically.

If science means "a demonstrative syllogism" or conclusions drawn from premises, it is evident that single laws form the stock and store out of which deductions are made, and which, in their turn, may become new laws and new bases for mental operations (*e. g.*, exemption). Science demands a knowledge not only of the several existing laws, but of their systematic and pragmatic putting together. Canonical science must be analytical as well as synthetic, and should be based upon critical and historical researches. And in this latter regard some progress, mainly due to the two brothers Ballerini and to German scholars, has been made.

Preëminently, however, law is *practical,* and hence the canonist should not only know the law, but also be able to apply it to concrete cases, such as occur daily. This is the function of what is called *jurisprudence* (*juris-*

prudentia sacra), or "the habit (*habitus*) of knowing, interpreting and applying the laws." [1]

As to the *necessity* or *importance* of this systematic-practical science, it is not too much to say that the "watchmen on Sion's tower," *i. e.* the *prelates,* are obliged to possess a more elaborate and extensive knowledge of ecclesiastical laws than is required of the lower clergy. For the prelates should be especially well versed as to the rights of the Church in regard to civil power, and should know the laws regulating their own attitude towards the clergy and the laity. This observation holds good also in regard to the officials of episcopal courts.

The *priests,* too, are bound in conscience to obtain a sufficient knowledge of Canon Law to enable them to discharge their duties as pastors of souls and to defend the rights of the Church and their own position. It is a sad saw, often repeated, "What's the use of Canon Law, the prelate is Canon Law." This saying is not only offensive to the prelates, who are thus represented as arbitrary law-makers and expounders, but betrays a lack of reverence for a noble, time-honored science, and degrades those who utter that unpriestly sentiment to the level of cowards or sluggards. Let them rather hear Gratian: "*Ignorantia mater cunctorum errorum maxime in sacerdotibus Dei vitanda est. Sciant ergo sacerdotes scripturas sacras et canones;*" and again: "*Nulli sacerdotum liceat canones ignorare.*" [2]

In order to make canonical science solid, extensive, and systematic, the canonist, and especially the professor of Canon Law, should be conversant not only with dogmatic and moral theology, but also with Church history and civil law. *History* will render the study of Canon Law

1 Schenkl, *op. cit.,* 41.

2 C. 4, Dist. 38.

more agreeable, give the student living pictures of the past, and help him to understand many laws otherwise barely intelligible. *Civil Law,* more particularly the old *Corpus Juris Civilis,* will furnish the key to a great many terms, *v. g.,* in civil and criminal procedure, and show the connection existing between civil and religious law. Besides, the priest being a citizen of the State, and, we may justly say, a citizen of higher standing than most others, it appears but just that, even in this respect, his "lips shall keep knowledge, and they shall seek the law at his mouth." [3] Therefore, in this country, for instance, the Constitution should not be a sealed book to priests, nor should they be strangers to the laws governing marriage, contracts, last will, and labor.

[3] Mal. II, 7.

CHAPTER III

THE SOURCES OF CANON LAW

The term *source* or *fountain* of Canon Law (*fons juris canonici*) may be taken in a twofold sense: a) as the formal cause of the existence of a law, and in this sense we speak of the *fontes essendi* of Canon Law or lawgivers; b) as the material channel through which laws are handed down and made known, and in this sense the sources are styled *fontes cognoscendi,* or depositaries, like sources of history.

SECTION 1

THE "FONTES ESSENDI"

Taking for granted that the Church is a complete and autonomous society (*societas perfecta*), she must evidently possess legislative power, *i. e.,* the faculty of enacting laws. For "a law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[1] Therefore, every law must proceed from the legitimate power residing in that community for which the law is given. Now, the Church Catholic being founded by our Lord and perpetuated by the Apostles and their lawful successors, among whom the Roman Pontiff holds not only an honorary but also a jurisdictional supremacy, the following must be acknowledged as ecclesiastical *lawgivers:*

1. *Christ* our Lord, the original source of divine laws laid down chiefly in the Constitution of the Church, and next to Him the *Apostles* as lawgivers either of divine or human laws, *viz.:* as inspired or merely human instruments.

2. The *Roman Pontiff,* either alone or in unison with a *general council,* as endowed with the supreme and ordinary power of enacting laws for the universal church;

3. The *Bishops* for their respective districts, inasmuch as they are empowered to enact laws subordinate to common law;

1 *S. Theol.,* I-II, q. 90, a. 4.

4. *Customs,* too, must be considered as a source of law, universal as well as particular.

Whether the *natural law* can be called a source of Canon Law depends on the formal declaration of the supreme authority; for the natural law as such — its extent is very uncertain — cannot be called a homogeneous source of Canon Law except it has been declared such by the highest authority.[2] Besides its range being very uncertain, the so-called natural law is often nothing but a subjective sentiment, or, at most, a dictate of reason.

2 Cfr. J. Laurentius, S.J., *Institutiones Juris Eccl.,* 1903, p. 9; Schenkl, *l. c.,* 37, justly remarks that the natural law should be cautiously used in Canon Law.

SECTION 2

THE "FONTES COGNOSCENDI"

These sources, as we have said, are depositaries in which we find collected the laws enacted in the course of centuries. They may also be considered as the channels through which the river and rivulets of legal enactment flow and are preserved. They do not constitute the law as such, but rather point out where it may be found. Among these sources are Holy Scripture and the decrees of popes and councils; also, in a measure, custom, inasmuch, namely, as it proves the existence and continuity of laws unwritten and perhaps forgotten.

ARTICLE 1

HOLY WRIT

1. When we speak of Holy Writ as a source of Canon Law, it is evident that we refer primarily to the writings of the *New Testament.* There we meet with a nucleus of constitutional laws which were later developed; there, also, are to be found moral precepts which form the connecting link between the Old and New Dispensations.

2. As to the *Old Testament,* a distinction must be made between moral, ceremonial, and judiciary laws. The strictly *moral* laws contained chiefly in the decalogue were received bodily into the New Law. Not so the *ceremonial laws,* which, being ordained for the external worship of God, were modified and even abrogated by the

Church, inasmuch as they were laws of the old Code and to some extent detrimental to the spirit of the universal Church,[1] and consequently have no binding force as laws of the Old Testament (*v. g.,* tithes).

The *judicial* laws of the Old Testament, *i. e.,* those which govern man's relations to other men, were enacted according to the needs of the old theocratic State and have lost their binding force by the coming of Christ. Yet as far as they suit the conditions of the New Testament, they may, not as O. T. laws, but as rules for the N. T., be used even in the Church, because they rest on the dictates of reason[2] (*v. g.,* prohibited degrees of marriage).

ARTICLE 2

DECREES OF THE ROMAN PONTIFFS

The decrees of the Roman Pontiffs have always enjoyed great authority in the Church, from the time of Clement I (+ 100?) to our own day.[3] Their subject-matter was partly dogmatic, partly disciplinary; it is the latter class that especially concerns Canon Law.

1. It was customary for the Pope, soon after having taken possession of St. Peter's Chair, and on other occasions, to gather a synod in Rome and to send the acts of that synod, together with a profession of faith, to the patriarchs and other prominent bishops. These documents often contained matter concerning not only the faith but also the discipline of the universal Church, and were called *constituta* (*scil. in synodo*). Besides, the Popes were often called upon to issue what are called *privilegia,* either for monasteries or for person-

1 Cfr. *S. Th.,* I-II, q. 103.
2 *Ib.,* qq. 104 ff.
3 Cfr. Coustant, O.S.B., *Epistolae Rom. Pontificum,* Paris, 1721, a work still useful and highly appreciated.

ages placed in high station. These sometimes bore the character of regular documents (*diplomata*), then again they were but personal letters, though written in a more solemn style, and having a silk thread (*litterae gratiae*) or a hemp thread (*litterae justitiae*) attached to them (eleventh century). Later on, especially under Martin V (1417–31), the custom prevailed in the Roman Curia of distinguishing two principal kinds of papal documents, *i. e., bullae* and *brevia,* which distinction is still preserved. At the time of Innocent VIII (1484–92) another sort of papal letters was introduced, not sealed but only signed by the Pope; their name is "*Motu Proprio*" (*scil. scriptae litterae*). This, in short, is the origin of papal documents.[4]

2. As to the *form* and *juridical value* of the various kinds of papal documents, the following distinctions may serve as a guide:

a) *Bullae, Brevia, Rescripta,* and between the two last-named the so-called "*Motu Proprio.*"

α) *Bullae,* or Bulls, thus called from the seal of lead appended to, or impressed upon, the paper or parchment,[5] and bearing on one side the images of SS. Peter and Paul and on the other the name of the reigning Pontiff, are solemn documents. If the matter or object to be expedited "*in forma Bullae*" is a very important one, such as the confirmation of a bishop, the erection or division of a diocese, or a solemn act of the R. Pontiff, the leaden seal hanging on a silken cord is appended. If, however, the Bull contains matter of less importance, *v. g.,*

4 Cf. Bresslau, *Handbuch der Urkundenlehre,* 1889, Vol. I (only one vol. published), p. 67 ff.; also Mabillon, *De Re Diplomatica,* Paris, 1681.

5 The original meaning of *bulla* is gem (precious ornament), then seal, from which it is transferred to the document provided with a seal, cf. *Thesaurus Linguae Lat.,* 1906, II, p. 2241 f., Du Cange, *Glossarium,* II, p. 1339.

dispositions regarding minor benefices or matrimonial dispensations, the document has a seal of red wax with the images of SS. Peter and Paul, and around them the name of the reigning Pontiff.[6] The opening words are: "[*Benedictus XV*] *Episcopus Servus Servorum Dei.*"[7] A special kind of Bull are the "*Bullae dimidiatae,*" which are issued between the election and coronation of a Pope, and bear only the image of the two Apostles, whilst the reverse side of the seal is blank.[8]

β) *Brevia,* or Briefs, which have grown out of the letters closed with wax, are issued in the *Secretaria Brevium,* and generally concern minor affairs (*negotia non gravia*), although, at times, in order to save expenses, Briefs are issued regarding matters which would really require a Bull, *v. g.,* the erection of *Abbatiae Nullius.* They begin with the name of the Pontiff, thus: "*Benedictus Papa XV,*" and end with the words: "*Sub annulo piscatoris.*"

"Motu Proprio's" and Rescripts have no special form.

We may add that the *Bullae* are now no longer written in Gothic but in the usual Latin letters, on parchment.[9]

b) Concerning their *juridical* value, it must be noticed that papal documents are variously styled: α) *Constitutions,* named after the ancient imperial constitutions, are Apostolic letters referring to important matters which concern the universal, or at least the entire Western Church. They may also be called, not improperly, *En-*

6 *Acta Leonis XIII,* 1881, t. I, p. 184 f.

7 This title dates back to the pontificate of St. Gregory the Great (590–604), and is of monastic origin, the monks calling themselves "servants of God," and this Pope, to reprove the arrogance of the Byzantine patriarch, styled himself "Servant of the servants of God."

8 Cf. *Cironii Observationes,* ed. Riegger, 1761, p. 5.

9 Thus ordained by Leo XIII, Dec. 29, 1878; cfr. *Archiv für kath. Kirchenrecht,* Vol. 41, p. 399; Aichner, *Compendium Juris Ecclesiastici,* § 10.

cyclical letters, though these generally refer to the persons addressed (viz.: the hierarchy) and contain less juridical matter (*v. g.*, "Rerum novarum," of Leo XIII, 1891).

β) *Decrees;* or *decretals*, to which belong those letters issued "Motu proprio" and "ad instantiam" (rescripts), broadly speaking, touch upon particular affairs and contain favors and privileges or answers to questions proposed by private individuals. It must, however, be added that "Motu proprio" does not exclude insistence or a request from interested parties.

ARTICLE 3

THE CANONS OF COUNCILS

Councils, as history testifies, were generally called at times when a crisis threatened the Church at large, or at least a considerable portion thereof. Although the first four general councils were convoked by the emperors, the "Bishop of old Rome" was represented by legates, and the decrees adopted were acknowledged by the universal Church. St. Gregory the Great speaks of those four councils as of four gospels.[10] Besides these imposing assemblies there were held provincial councils, *v. g.*, at Antioch, Ancyra, Sardis, which also enjoyed great authority. Still a distinction was always made between universal and particular synods; the canons of the former were received by all, whilst those of the latter had only local force, except when they were inserted in an authentic collection of Canon Laws. No authentic collection of conciliary decrees as such exists. Of general Councils, two were held at Nicaea in Bythinia (325, 787),

10 *Registrum Greg.*, P. I, 24, ed. Ewald-Hartmann (*M. G.*), 1891, I, 36 (this is a model *epistola synodica*).

four at Constantinople (381, 553, 680, and 869), one at Ephesus (431) and Chalcedon (451), four at the Lateran (1123, 1139, 1179, 1215), two at Lyons (1245, 1274), one at Vienne (1311–13), one at Constance (1414–18), one at Basel-Ferrara-Florence (1431–45), one at Trent (1545–63), and one at the Vatican.

ARTICLE 4

THE UNWRITTEN LAW

A certain amount of traditional law is in vogue everywhere. It is the living spirit of the people's judgment, or "common sense." The Church, too, has her *traditions,* which testify to the observance of discipline, although there may be no corresponding law. Thus the celebration of the Sunday instead of the Jewish Sabbath[11] is called a divine tradition. Human traditions are, *e. g.,* that which causes Easter to be celebrated on a certain day and the existence of minor orders.

Besides, there are *writings* of *ecclesiastical authors* which prove the existence of certain customs in ancient times. These, however, if not embodied in an authentic collection, have merely historical value.

Leaving traditions aside as being now defined and to a great extent determined, Canon Law is more especially interested in *custom,* which shall be treated in the Commentary proper.

11 C. 5, Dist. 11.

CHAPTER IV

HISTORY OF THE SOURCES AND LITERATURE OF CANON LAW

The chief authorities to be consulted are:

BALLERINI, Peter and Jerome, in their ed. of the *Opera Leonis M.*, t. 3 (Migne, *Pat. Lat.*, t. 56);

P. COUSTANT, O.S.B., *Epistolae Rom. Pontificum*, Parisiis, 1721, Praef.;

F. LAURIN, *Introductio in Corpus Juris Can.*, Friburgi, 1889;

F. MAASSEN, *Geschichte der Quellen u. der Literatur des Canonischen Rechts*, Gratz, 1870 (Vol. 1, the only one published);

J. F. SCHULTE, *Geschichte der Quellen u. Literatur des Canonischen Rechts von Gratian bis auf die Gegenwart*, 1875, 3 vols.;

AUG. THEINER, *Disquisitiones Criticae*, 1836.

The critical and historical method of treating the sources of Canon Law began with Humanism, or, more properly, with Nicholas of Cusa (Cusanus, + 1464). That the Pseudo-Isidorian Collection should be first attacked was natural. But this was but a beginning. Much remained to be done in regard to papal letters and conciliary decrees. A great deal had been achieved by the Spaniard Antonius Augustinus, in the sixteenth century, but his work was left incomplete. More elaborate were the critical labors of the brothers Peter and Jerome Ballerini, who deserve a distinguished place in canonistic

literature. The names of Maassen and Schulte also are favorably known in this line of studies.

We can give only a brief historical sketch of the collections made according to the various epochs which Canon Law traversed.

SECTION I

FIRST PERIOD (TO ABOUT 1150)

Some disciplinary regulations are to be found in the so-called "*Constitutiones Apostolorum,*" a fifth-century collection, made up of the "Doctrina XII Apostolorum," "Didascalia Apostolorum," and "Canones Ecclesiastici Apostolorum," to which were added the "Canones Hippolyti."[1] This collection, made by an anonymous writer imbued with heretical tendencies, contains some traditional customs concerning episcopal elections, ordination and qualities of aspirants to the priesthood, minor orders, etc. But it cannot properly be termed a source of Canon Law.

A collection of conciliar canons must have existed at the time of the Council of Chalcedon (451). Most probably this collection contained the enactments of "*Seven Councils,*" *viz.:* those of Nice, Ancyra, Neo-Cæsarea, Gangræ, Antioch, Laodicæa, and Constantinople. To these were added later the canons of the councils of Ephesus, Chalcedon and Sardis (343), and the combined collection was eventually called *Collectio Decem Conciliorum.*[2] To this were prefixed the "Canones Apostolorum," 85 in number, which were received by the Trullan Synod held in the year 691–692 and are still

1 Cfr. Funk, *Didascalia et Constitutiones,* 1906; O. Bardenhewer, *Geschichte der altchristlichen Literatur,* 1903, Vol. 2, pp. 69, 255 ff.; Bardenhewer-Shahan, *Patrology,* 1908, pp. 349 ff.

2 Maassen, *op. cit.,* pp. 126 ff.; P. Coustant, *op. cit.,* pp. LVIII.

acknowledged in the Eastern Church as "*Codex Ecclesiae Orientalis.*" [3]

Whilst these collections were chronological, the later ones were *systematic*, beginning with one by an unknown author and another by Joannes Scholasticus (c. 550), distributed into 50 titles.

Another species of systematic collections were those styled "*Nomocanones,*" containing, as the name implies, both civil (νόμος) and ecclesiastical (κάνων) laws. Several such collections were made in the sixth and seventh centuries and one of them was revised by Photius (c. 883).[4] This caesaro-papistic collection was based on the still acknowledged principle of the Oriental Church that "in illis quae canones non determinarunt, debemus sequi leges civiles." [5]

ARTICLE 1

OCCIDENTAL COLLECTIONS

The Greek collections mentioned above found their way into the Latin Church as early as the close of the fifth century, when a translation of the Greek canons was made and spread in Italy and Spain. In this latter country the spread of the Latin translation of the Eastern Councils was due especially to Isidore of Seville, and hence it goes by the name of *Isidoriana*, whilst the Latin translation used in Italy was called "*Prisca.*" [6]

In the latter country, most probably in Rome, a

3 Milasch-Pessič, *Kirchenrecht der abendländischen Kirche*, 1905, pp. 81 ff.

4 V. Scherer, *l. c.*, I, 197.

5 Cfr. *Syntagma Atheniense*, I, 68 (Milasch, *l. c.*, p. 50).

6 It was thus called from the preface of the Dionysian version, "priscae translationis." Cfr. *Voelli et Justelli Bibliotheca Juris Can.*, Paris, 1661, t. I, p. 101; Maassen, *l. c.*, pp. 87 ff; Ballerini (Migne, 56, col. 83 f.).

Scythian monk, *Dionysius Exiguus* (Denys the Little, + before 555), made a translation of the Greek canons, 213 in number, to which he added fifty "Canones Apostolorum" and 138 canons of African councils. This collection was increased by the "Decretales SS. Pontificum" issued from the time of Siricius (384–94) to the pontificate of Anastasius (+ 498), 197 in number. A copy of this double collection of conciliar canons and papal decrees, with some additional decretals, was donated by Pope Hadrian I to Charlemagne in 774, and subsequently called *Dionysio-Hadriana.* It enjoyed great authority in Italy, Gaul, Africa, Spain, and England.[7]

In *Africa* a collection of the decrees of councils held from 397 onward was made at an early date and condensed into the *"Breviatio Canonum"* of Fulgentius Furandus towards the middle of the sixth century. A systematic handbook destined for school use was the work entitled "Concordia Canonum" of Cresconius, published in the year 690.[8]

Of *Gallic* origin are the so-called *"Statuta Ecclesiae Antiqua"* of the sixth century.[9] Another collection of French descent is that named from its editor Paschase Quesnel, *Quesnelliana,* and the one published by d'Achery, O.S.B. (+ 1685), called *Dacheriana.*[10] The latter author also edited a collection of penitential canons which goes by the same name, but was originally called "Collectio Canonum."

Spain had the *Isidoriana,* which through the magic name of St. Isidore (+ 636) gained great authority, and

7 Maassen, *l. c.*, pp. 444 ff.; pp. 965 ff.; Migne, *l. c.*, 195 f.

8 Mabillon, *Iter Italicum*, 1724, II; ed. Th. Sickel, 1889.

9 Migne, 56, 282; 273 f.; Maassen, *l. c.*, 79 f.; 806 ff.

10 Ballerini, *l. c.* (Migne, 53, 106 f.); Maassen, *l. c.*, 382 f.

was twice revised between 589 A. D. and the close of the seventh century; and a collection made by, or published under the name of, Martin of Braga, and circulated as *"Capitula Martini."* [11]

Besides these collections of Canon Law proper, the *Penitential Books,* published especially in Ireland, England and France, enjoyed great esteem.[12]

For the *jus liturgicum* the *Sacramentaria* [13] and *Ordines Romani* [14] are of great importance. For the chancery of the Roman Curia, its style and methods of expedition, the *"Liber Diurnus"* is invaluable.

ARTICLE 2

SPURIOUS COLLECTIONS OF THE NINTH CENTURY

The ninth century was rife with fabrications, not only in hagiography, but also in Canon Law. To this category belongs a collection named *Continuatio ad Capitularia Regum Francorum,* which the Levite Benedict of Mayence professes to have taken from the archives of that Church and compiled at the request of Bishop Hatto (825–47). It contains genuine canons and decrees side by side with spurious ones manufactured by Benedict.[15] Not much different in character and style are the *Capitula Angilramni.* Both this and the former collections originated in northeastern France.[16]

11 Migne, 141 f.; 309; Maassen, 436 f.; 536 ff.; 848 ff.

12 Migne, 53, 218; Maassen, 802 ff.; 677 ff.

13 Cfr. Wasserschleben, *Die Bussordnungen der abendländischen Kirche,* 1851; Schmitz, *Die Bussbücher,* 1883.

14 Probst, *Die ältesten röm. Sacramentarien,* 1892.

15 Cfr. *Monumenta Germaniae Historica, Leges,* II, 2, 39–158.

16 Cfr. Hinschius, *Decretales Pseudo-Isidorianae et Capitula Angilramni,* 1863, Praef., CXCIII ff.; CCXXX, p. 757.

The Pseudo-Isidorian Decretals

This collection has, since the fifteenth century, claimed the attention of critics. That it contained considerable fraudulent matter was perceived by the famous humanist, Cardinal Nicholas of Cusa,[17] and has since been acknowledged by most "Romanists," although some later writers, like Torres, Malvasia, and Cardinal d'Aguirre, defended its genuineness.

1. *Contents.* The collection consists of a preface and three parts. The *Præfatio* contains the foreword of pseudo-Isidore (*Mercator* or *Peccator*), a spurious letter of Aurelius of Carthage to Pope Damasus with the latter's equally spurious reply, and the "Ordo de Celebrando Concilio."

Part I contains 50 *Canones Apostolorum* and *decretals* of Popes from Clement I to Melchiades (+ 314) — the latter, with the exception of the Clementine letters, all manufactured by "Mercator."[18]

Part II is made up of (a) *De Primitiva Ecclesia,* (b) *Exemplar Constituti Constantini,* and (c) *Canons of Councils* from the Nicene to the second of Spain, partly in the form of the *Hispana,* partly in that of the *Quesnelliana.*[19]

Part III exhibits some excerpts from Pope Silvester and a number of genuine *decretals* from Mark (+ 336) to Gregory II (715–31) in the form of the *Hispana.*[20] The number of apocryphal decretals is about 46 and that of the chapters which the author himself compiled about 104.[21]

17 *Concordantia Catholica,* III, 2; Ballerini (Migne, 56, 210).

18 Hinschius, *l. c.,* p. LXX.

19 Hinschius, *l. c.,* pp. LXXXIII ff.

20 Hinschius, LXXXIX.

21 Cfr. Coustant, *l. c.,* CXXVI; Hinschius, CVIII.

2. *Author* and *Time of Composition.* It is commonly held that the birth-place of these pseudo-decretals must be sought, not in Rome (as Eichhorn and Theiner claimed), but in the western part of France. The exact place still forms a matter of controversy. While some (*v. g.* Hinschius [22] and von Scherer [23]) regard the diocese of Rheims as the home of the fraudulent compiler, others (especially Fournier [24]) assign him to the province of Tours and in particular to Le Mans.

As to the *time* of compilation there is no great divergency of opinion, for it is generally set between 847 and 853.[25]

3. *Purpose of the Compiler.* It is scarcely credible that the author had for his sole purpose the aggrandizement and defense of the Apostolic See,[26] or that of the bishops of Gaul or any particular part of it.[27] He says in the preface that he desired to gather the scattered canons into one volume. However, this was not his only purpose, otherwise his fabrications would have been superfluous. There can be no doubt that the compiler had still another end in view. This was, as Fournier [28] and others set forth, a twofold one: (a) to protect the authority of the bishops and clergy against encroachments of the potentates and lay-power at large, and (b) to secure the authority of the Roman Pontiff over particular synods, and to defend the hierarchy in all its degrees. Concerning the first point the emphasis laid on immunity is most notable. As to the other point it may be noticed

22 Pseudo-Decretals, Pref., CCXI.

23 *Handbuch des Kirchenrechts,* 1887, I, 222 f.

24 *Les Fausses Décrétals,* in *Revue d'Histoire Éccl.,* 1906, 784.

25 Hinschius, *l. c.,* p. CCI.

26 Ballerini (Migne, 53, 246).

27 Hinschius, *l. c.,* CCXIII f.

28 *Revue. d'Hist. Éccl.,* 1906, p. 548.

that the Apostolic See was not in need of apocryphal documents to assert its rights.[29]

4. *Influence of the Collection.* It has frequently been said that Pseudo-Isidore ushered in an entirely new discipline. If this were true, only a solemn anathema on that fraudulent writer could repair the damage done to Canon Law. However, we must beware of both extremes — overrating the influence exercised by this collection as well as minimizing it unduly. A little distinction may be helpful in determining its true influence.

The *material* sway it exerted we see in the greater dependence of bishops and provinces on the Holy See — more centralisation — and in the outspoken tendency of the compiler to accentuate what we comprise by the term "immunity," and by extending the matrimonial degrees, which was then unheard of.

The *formal* influence consisted in the precision and divulgation of laws which, though already existing, were not yet accurately determined, *v. g.,* concerning the confirmation and deposition of bishops, appeals, immunity. It cannot be denied that this fraud rendered a bad service to Canon Law, bringing it into discredit and evil repute for a time.[30]

In *Germany* two collections were widely known and made use of, to which may be added a third. They are:

a) Regino of Prüm's "*De Synodalibus Causis et Disciplinis Ecclesiasticis,*" which was made between 906 and 915, in which latter year Abbot Regino died.[31]

29 Ballerini (Migne, 56, 246).

30 Von Scherer, *l. c.,* I, 227; Coustant, *l. c.,* Praef., CXXVII. An excellent monograph in English, by a Protestant lawyer, is now available in *The False Decretals,* by E. H. Davenport, Oxford, 1916.

31 Cfr. Ballerini (Migne, 56, 319); Regino's collection was published in Migne, 132, 17 f. and by Wasserschleben, 1840.

b) More renowned is the *"Decretum Burchardi."* Burchard was Bishop of Worms, and composed his collection for practical purposes, especially for the visitation of his diocese. It consists of twenty books, the nineteenth of which is called "Corrector sive Medicus" and treats of penitential discipline. Burchard's chief sources were the "Collectio Anselmo Dicata," whose arrangement he adopted, and Regino's collection. Besides, he quoted many false decretals (about 173 in number), and invented new ones (about 59). He also changed or mutilated the inscriptions of titles and chapters.[32] But despite all these shortcomings the work found a ready reception, not only in Germany, but also in Italy, where Gratian introduced it into his Decretum[33] as "Brocardicae."

c) Belonging to the "Gregorian" group is the *"Capitulare"* or *"Breviarium Hattonis,"* composed about 1080.[34]

ARTICLE 3

COLLECTIONS OF THE TENTH AND ELEVENTH CENTURIES

The Pseudo-Isidorian Decretals were followed by other collections, more or less spurious, not only in France, but in Italy and Germany as well. The age was prolific in forgeries.

1. In *Italy* there was one published which is not as yet printed, although it would, according to our view, based upon inspection of the original MSS.,[35] deserve

32 Cfr. Fournier, *Études Critiques.*

33 See Friedberg, *Decretum Magistri Gratiani,* Leipsic, 1879, pp. XLV ff.

34 Edited by Mai, *Nova Bibliotheca Patrum,* VII, P. III, 1–76; v. Scherer, *l. c.,* I, 240.

35 Contained in the Cod. Paris. 15392, Cod. Mutinens.; besides in the Palat. Vat. 580 and 581, which

more attention. This, the "*Collectio Anselmo Dicata*," was made towards the end of the ninth century.

The investiture controversy brought forth some collections which are all imbued with the spirit of Gregory VII and therefore called "*Collectiones Gregorianae*." To this group belong:

a) The *Collectio Anselmi Lucani* (Anselm of Lucca, + 1086);

b) The "*Collectio Canonum Cardinalis Deusdedit*," dedicated to Pope Victor III (1086–87);[36]

c) The "*Decretales Bonizonis*," composed soon after 1089;

d) The "*Polycarpus*" of Cardinal Gregory, issued soon after the death of Pope Calixt II (+ 1124).

The Vatican Library furthermore contains some interesting MSS. pertaining to collections of that period, which await publication.[37]

3. In *France* some notable special treatises were published, *e. g.*, Hincmar of Rheims' "*De Divortio Lothari Regis*,"[38] and Jonas of Orleans' (+ 843) "*De Laicali et Institutione Regali*."[39] *Collections* proper are:

a) The "*Canones Domni Abbonis*" of Fleury (+ 1004), dedicated to King Hugh and his son Robert, a collection of genuine canons and papal decretals, also containing *Capitularia Regum Francorum* and *Novellae*.[40]

b) A "*Compilatio Juris Canonici*" of about the

are written in the Carolingian minuscules. This Anselm, to whom it is dedicated, was Archbishop of Milan, 883–97; cfr. Ballerini (Migne, 56, 315 ff.), Coustant, *l. c.*, Praef., CXXVI; Fournier, *Études Critiques sur le Décret de Burchard de Worms*, 1910, p. 10.

36 Published by Martinucci, 1869, and by Wolf von Glanvell, 1905.

37 Cod. 1339 in 5 books; Cod. 1346 in 7 books, more or less dependent on Pseudo-Isidore.

38 Migne, *Pat. Lat.*, 125, 623 ff.

39 Migne, *l. c.*, 106, 121 ff.

40 Ballerini (Migne, 56, 320, 139, 473 ff.).

same date, treating of the reception of heretics and some of the sources of Canon Law.[41]

c) The *"Decretum Ivonis Carnotensis"* (+ 1117), which consists of seventeen books, and the same author's *"Panormia"* in eight parts. The former is a rich collection not only of canonical matter but also of theological lore, *e. g.,* on baptism, confirmation and the Holy Eucharist. The "Panormia" was said to be the compilation made from Ivo's Decretum by the Catalonian Hugo, but it is probably Ivo's work.[42]

d) A *"Collectio Trium Partium,"* divided into 29 titles, was made from Ivo's work soon after his death.[43] Then there is the work of *Alger* of *Liège* "De misericordia et justitia," c. 1121, consisting of three parts.[44]

In *Spain* a collection of 15 books appeared shortly after the Pontificate of Urban II (1088–1099).[45]

41 V. Scherer, I, 238.

42 Theiner, *l. c.,* pp. 162 f.; Migne, 56, 104.

43 Theiner, *l. c.,* pp. 154 ff.

44 Migne, 180, 857 ff.; v. Scherer I, 242.

45 Ballerini (Migne, 56, 352 f.).

SECTION 2

SECOND PERIOD (TO THE COUNCIL OF TRENT)

This epoch is distinguished by two prominent characteristics. Canon Law becomes independent of theology as such and is cultivated as a *science* proper. The "Magister" ushers in that period, so glorious for canonical lore and resplendent with names immortal. The appearance of standard or *authentic collections* sheds lustre on Canon Law, which now grows into Pontifical Law and irradiates immediately from St. Peter's Chair. These authentic collections are now, first of all, to be considered. It is necessary, however, to premise a few words on the famous *Decretum Gratiani.*

ARTICLE 1

THE DECRETUM MAGISTRI GRATIANI

1. AUTHOR AND NAME.—As the glossators testify, the author of the famous Decree is *Gratian,* who lived and taught as a member of the monastery of SS. Felix and Nabor at Bologna. It is most probable that this monastery then belonged to the Camaldulese. Of Gratian's career we know nothing, except that he died before A. D. 1160.[1]

There is historical evidence that the "Magister," as he was called, had entitled his work "*Concordia Discordan-*

1 Cfr. Maurus Sarti, O. Cam., *De Claris Archigymnasii Bononiensis Professoribus,* 1769–72; Schulte, *Quellen,* 1875, Vol. I, pp. 46 f.; Laurin, *l. c.,* p. 10.

tium Canonum." [2] His purpose, according to his disciple, the famous Magister Rolandus (later Alexander III),[3] was to make apparently contradictory canons agree and to remove latent divergencies. However, already towards the end of the twelfth century, the collection was commonly called *Decretum Magistri Gratiani,* although it was also cited by the names "Codex," "Corpus," or "Liber Decretorum," or simply, "Corpus Juris Canonici." [4]

2. Division.—The threefold general division was made by Gratian himself,— *De Personis, De Causis, De Sacramentis.*[5]

Part I consists of 101 distinctions, divided into canons, — but not by Gratian. It contains a treatise on the principles of Canon Law and a long treatise *"De Electione et Ordinatione Clericorum."*

Part II was divided by Gratian himself into 36 *Causae,* and each causa into *Quæstiones,* which, in their turn, were subdivided into *Canones.* The first ten *Causae* might be inscribed *"De Judiciis"; Causae* 11–20, *"De Bonis Ecclesiasticis et Regularibus." Causae* 21–26 treat of benefices and privileges, *Causae* 27–36, of marriage.

Causa 33, Quaestio III, contains the *"Tractatus de Poenitentia,"* which Gratian inserted here, but did not himself divide into seven *Distinctiones,* as we now have it.

Part III was inscribed, *"Liber de Sacramentis,"* for which title Paucapalea substituted *"De Consecratione."* It is divided into five distinctions.[6]

3. Mode of Alleging.—A canonist will never quote,

2 Friedberg, *Decretum Magistri Gratiani,* 1879, Prol., X.

3 *Summa Magistri Rolandi,* ed. Thaner, 1874, p. 4.

4 Laurin, *Introductio,* p. 25.

5 Cfr. Schulte, *Quellen,* I, 50 ff.

6 *Ibid.,* I, 50 ff.

e. g., "*in Decreto Gratiani,*" but follow the usual mode of citing the decree:

Part I: *c. i, D. i,* which would read: Canon first, Distinction first. Sometimes we find the initial words only quoted, *e. g.*, "*Si quis apostolicae,*" LXXIX, which is Can. 1, Dist. 79. Of course, in that case the index must be consulted, which now takes the place of memory, on which the law-students of former times had to rely.

Part II has the distinctive sign C (Causae, written with a capital C), taking the middle between canons and questions, thus: *c. 29, C. 17, q. 4,* or again with the initial words of the canon: "*Si quis suadente diabolo,*" which is the canon quoted in number and abbreviated letters. *De Poenitentia:* c. i, Dist. 5 de Poenit. which reads: canon 1, Distinction 5, with the characteristic sign, "*De Poenit.*" We must draw attention to the fact that two of the *Causae* exhibit a transposition of questions; in *Causa* 2, *quaestio* 5 is placed immediately after 3; and in *Causa* 16, *quaestio* 5 directly follows 3.[7]

Part III: *c. 16, Dist. 5 de consecr(atione),* which signifies canon 16, Distinction 5 *de consecratione;* or again with the beginning words: "*Quadragesima summae*" *de consecr.*

Note that older canonists simply quote "*in Decretis*" with the initial words of the canons, and if the text does not fully cover the proof, they say "*arg*" (*argumentum*).[8]

4. Rubricae, Dicta Gratiani, Paleae.—To show the author's method it suffices to point out the brief summaries which precede almost every canon or authority alleged by the "Magister." These summaries are placed at the head in red (ruber) ink and hence called *rubricae.*[9]

[7] Laurin, *l. c.*, p. 7 (thus also in Friedberg's edition).

[8] *Id.*, pp. 9 f.

[9] Cfr. Schulte, *l. c.*, I, 54.

Furthermore, the Master employed at times some longer expositions, which were either to prove his view on certain canons or a deduction from the authorities alleged. These elucidations were styled *paragraphi* or *dicta Gratiani.* They are to be found either before or after a *distinctio* or *causa* or *quaestio,* and savor of the scholastic disputation.[10] They were intended to remove contradictions between different canons by pointing out that one canon formed the rule, whereas the other was an exception, or that one contained a precept, whereas the other was only a counsel; one emanated from a higher, the other from some inferior authority; one was given for the universal Church, whereas the other referred to a particular province, etc.[11]

The *Decretum,* as now published, contains many *additions* which are not the work of Gratian. It is certain that the Master's disciple, Paucapalea, added some decretals, wherefore all the additions were called *paleae.*[12] Their number is not quite certain, perhaps they form 166 out of the 3848 chapters of which the *Decretum* consists.[13]

5. Sources and Authority.—(1) The sources are either directly or indirectly taken from their collections and collectors. The *direct* sources are 17 apostolic canons, apocryphal as well as genuine decretals from Pseudo-Isidore, the writings of the Fathers, four chapters from St. Benedict's Rule, and Roman, Visigothic and Frankish civil laws.

Indirect sources were those of the collections: Anselmo dicata, Regino, Burchard, Luccani, Deusdedit, Polycarp,

10 *Ib.,* 55 ff. A famous *"dictum Gratiani"* is that ad c. 16, C. 25, q. 1, on the nature of privileges.

11 Schulte, *l. c.,* I, 60; v. Scherer, *l. c.,* I, 243.

12 Another explanation, *viz.* that of "straw" (*palea*), is given by Huguccio, ad c. 51, C. 27, q. 2.

13 Friedberg, *l. c.,* Proleg., p. XIV; Schulte, *l. c.,* I, 56 ff.

Ivo, Algerius.[14] But the lack of critical genius of his age is also noticeable in Gratians' work.

(2) The reception given to the *Decretum* is almost incredible in our critical time. It was called "*opus aureum*" or "*divinum decretorum opus.*"[15] There seems to be a reason for the applause with which the Magister's work was hailed: on account of the rich materials he had gathered and the scientific method he had adopted, especially in his "*dicta*" and general arrangement, the Decree soon made other collections superfluous and was generally used in schools and courts.[16]

In spite of all this veneration, however, the *Decretum Gratiani* has *never* been considered or declared an *authentic collection.* It was made by private authority and remained such. Hence its authority is neither more nor less than the sources laid under contribution are worth. A decree made by a universal council (*consideratis considerandis*) has the value of a universal law; a canon adopted by a particular council receives no additional force by being inserted in the Decree beyond that which it had before Gratian, etc. Hence each source must be examined independently as to its origin, authenticity, and authority.

At the same time it must be remembered that the Decree, on account of its popularity and the influence it exerted on teachers and judges, paved the way for other collections, which were no longer of merely private authority.

6. Time and Editions.—When Gratian composed his *Decretum* is a matter of controversy. We do not be-

14 Friedberg, *l. c.*, pp. XIX ff.; p. XLII.

15 Cfr. Berardi, *Gratiani Canones Genuini*, 1783, I; Sarti, *l. c.*, I, 247; Laurin, *l. c.*, pp. 44 f.

16 Sarti, *l. c.*, I, 247; Berardi, *l. c.*, Praef., XXVIII; Schulte, *l. c.*, I, 329.

lieve that intrinsic reasons will ever be found to clearly determine the time of its birth. What has been urged [17] in favor of an earlier than the usually accepted date, is not solidly proved nor free from bias. Extrinsic reasons rather favor 1150–1151 as the probable year of publication. The glossa of Joannes Teutonicus ad c. 31, C. 3, q. 6 and an old MS. state these two years, respectively.[18]

In the course of centuries the *Decretum* was often copied, sometimes with and sometimes without *glossae*, and the faithful rendering of the original text depended on the care of the copyists. Mistakes and corrections were already noticed by St. Antoninus (+ 1459) and they increased after the art of printing had been invented. Antony de Mouchy, in the edition of 1547, and Antony Conte, in the Paris edition of 1556 and the Antwerp edition of 1570, drew attention to spurious decretals. The *Correctores Romani* endeavored to eliminate some palpable errors and to render the text more intelligible. In 1580 and 1582 appeared a so-called official but not authentic text.[19] Henceforward the *Decretum* was reprinted by private savants, generally in connection with the "*Corpus Juris Canonici.*" [20]

Appendices and Compilations.—Soon after the publication of the Decree some decretals were added to it or separately published, *e. g.*, the "*Appendix Concilii Lateranensis,*" the "*Collectio Bambergensis,*" the "*Collectio Lipsiensis,*" the "*Decretales Alexandri III.*" [21]

17 The formula "*salvâ sedis apostolicae auctoritate*" has been alleged by Theiner and Schulte to prove 1139 as the year of divulgation.

18 The codex reads: "*Decretum Gratiani, monachi, Felicis Bononiensis, Ord. S. Benedicti completum in dicto monasterio anno Dmi. MCLI, tempore Eugenii tertii;*" Laurin, *l. c.*, p. 34.

19 Theiner, *l. c.*, app., p. 3; Friedberg, Prolog., LXXV ff.

20 Cfr. below on the whole C. J. C.

21 Cfr. Theiner, *l. c.*, p. 4 ff.; Schulte, *l. c.*, I, 77 ff.

Of greater importance than these were the five so-called *Compilationes, viz.:*

a) *Compilatio I Bernardi Papiensis,* entitled by the author "Breviarium Extravagantium," issued between 1187 and 1191, divided into 5 books with titles and chapters according to the famous verse, "*iudex, judicium, clerus, connubia, crimen.*"

b) *Compilatio II,* by John of Wales (Joannes Walensis), published before 1200. Neither of these compilations is *authentic,* whereas the folowing three must be considered authentic:

c) *Compilatio III,* made at the request of Innocent III by Petrus Collavicinus or Beneventanus (1210).

d) *Compilatio IV,* perhaps made by Innocent III himself, and consequently before or about 1216, although published only in 1217.

e) *Compilatio V,* made and promulgated under the auspices of Honorius III, 1226.[22] These three collections were alleged in schools and courts in the same manner as the Decretals.

ARTICLE 2

DECRETALES GREGORII IX (1234)

1. NAME.—By a Bull dated Sept. 5th, 1234, Gregory IX promulgated a collection of "Constitutions and Decretals," to which he himself, referring to the five preceding, attributed the name "*compilatio.*" It was soon called "*nova*" (*scil. compilatio*) as well as "*Liber Extravagantium*" (*scil. extra Decretum*) and added to the five other compilations. However, the name "Decre-

22 Cfr. Theiner, *l. c.,* pp. 1 ff.; Schulte, *l. c.,* I, 80 ff.; Laurin, *l. c.,* 97 ff.; Friedberg, *Quinque Compilationes Antiquae,* 1882; v. Scherer, I, 247, 31.

tales" became more usual and finally exclusive,[23] and is now constantly employed.

The *reason* for this collection is stated in the Bull "Rex pacificus" as follows: Some decretals, on account of their length and resemblance to each other, appeared to cause confusion and uncertainty in the schools as well as courts, and to remedy this evil, the present collection is issued as an *authentic* one, to be employed in schools and ecclesiastic courts *exclusively* of all others. This meant that (a) the former five compilations were henceforward destitute of juridical value, and therefore could not be alleged as law-texts by the ecclesiastical judges; (b) each and every chapter in its dispositive part, no matter what its source or authority, was to have full juridical value as a law-text; (c) the collection was to be considered *the* Code of Law for the universal (Latin) Church, to the exclusion of all others of a general character. But this collection did not abrogate either the *Decretum Gratiani* or existing particular laws and customs, nor did it prevent the publication of later codes.[24]

2. Compiler and Matter.—As the Bull "Rex pacificus" tells us, the Pope commissioned his chaplain and confessor, Bl. Raymund de Peñaforte (+ 1275), to make this compilation, and he accomplished his task within the space of four years, so that the collection could be published in 1234.

The *material* was gathered from Holy Scripture, from the canons of particular as well as universal councils, and from papal decretals. A few are taken from the civil laws. Most of the Decretals, with the exception of those of Innocent III and Gregory IX, were copied from the "five compilations." There are 1971 chapters, of which

23 Friedberg, *Corpus Juris Can.*, II, Proleg., p. X.

24 Laurin, *l. c.*, pp. 141 ff.; v. Scherer, I, 251 f.

1766 are borrowed from the compilations mentioned.

3. Order and Mode of Quoting.—The whole collection is divided into five *books* according to the well-known verse quoted above (p. 36), each book into *titles,* and each title into *chapters.* Each title has an inscription, and the chapters are generally preceded by *rubrics* or brief summaries, which, however, are of purely private authority, whereas the *titles,* whenever their words exhibit a complete meaning (*e. g.,* "*Ne sede vacante aliquid innovetur,*" III, 9) have legal value. When the decretals appeared too long, Raymund cut off the *arenga,* or *narratio,* retaining only the dispositive part. The cut-off parts ("*partes decisae*") were marked "*et infra.*" The modern way of *quoting* these decretals is: *c. 4, X, I, 4, i. e.,* chapter 4, liber extravangantium (viz. extra or outside the Decretum Gratiani and the five compilations), book first, title fourth. Sometimes the beginning of the chapter is quoted with "extra" and the inscription of the title, v. g., *De Consuetudine.*

ARTICLE 3

Decretales Bonifacii VIII (1298)

From the time of Gregory IX the Roman Pontiffs developed much legislative activity. Thus Innocent IV (Fiesco), a canonist of merit, issued various Decretals, which he himself collected and divided into 28 titles with 42 chapters. Another collection was sent by the same Pope to the famous University of Bologna, in 1253.[25] Alexander IV, Clement IV, and Urban IV also issued Decretals, which were sometimes simply added to Greg-

25 Theiner, *l. c.,* p. 66; Schulte, *Quellen,* II, 30 ff.; Laurin, *l. c.,* pp. 166 ff.

ory's collection, sometimes remained "x," as *Novellae.*[26] These motley decretals caused some uncertainty. Whereupon three dignitaries, William, Archbishop of Embruns, Berengarius, Bishop of Beziers, and Richard of Siena, Vice-chancellor S.R.E., were ordered by the Pope to "revise" the Decretals, and after revision, to send them to the universities of Bologna and Paris. This was done in 1298, and the collection thus made at the request of Boniface VIII was added to the existing Decretals of Gregory IX as a continuation to the same, and therefore called "*Liber Sextus.*" So we read in the Bull "Sacrosanctae," March 3, 1298.[27]

1. Matter and Arrangement.—The three above-named compilers took their materials from the canons of the first and second Councils of Lyons (1245, 1274) and from the Decretals of Gregory and his successors up to Martin IV and Boniface VIII. The Decretals of the latter form 229 chapters. The compilers made use of the preceding compilations and added the eighty-eight "*Regulae Juris,*" taken from Dinus of Mugello (de Rossonibus).[28]

The title headings were taken from Gregory's, also the rubrics as well as the inscriptions of the single chapters. The latter, however, were often abridged, sometimes changed, and sometimes even wrongly quoted. The "*partes decisae*" were no longer marked "*et infra,*" but simply "cut off." On the whole this collection is not as faithful and precise a rendering of the original text of the Decretals as one might have expected from Boniface VIII, but it has the character of a juridical code. Al-

26 Schulte, *l. c.*, pp. 31 f.; Laurin, *l. c.*, pp. 171 ff.

27 Friedberg, *Corpus Juris Can.*, II, 933 f.

28 Sarti, *l. c.*, I, 234 ff.; v. Scherer, *l. c.*, I, 252; Laurin, *l. c.*, 177.

though called "*Liber Sextus*" and intended, as it were, to be a continuation of the Gregorian Decretals, it is really an independent collection, consisting, like the first authentic collection, of five *books* with their respective *titles* divided into *chapters*.

Hence the *mode of alleging* this collection is the same as that of the Gregorian compilation, with the sole difference that VI or 6° is substituted for X; hence: *c. i, 6°, I, 2* = chap. 1 (Liceat), in the Liber Sextus, book 1, title 2 de Constitutione.

2. The *juridical value* of the *Liber Sextus* is nearly the same as that of Gregory's Decretals, which were not abrogated by this collection. But it invalidated all the Decretals issued between Sept. 5, 1234, and Dec. 24, 1294, and not inserted in the "*Sextus*" or reserved, *i. e.*, indicated as such. The "*Regulae Juris*" have no legal value.[29]

ARTICLE 4

CLEMENTINAE (1317)

1. As the troublesome times required, Clement V published several constitutions, especially at the Council of Vienne in France (1313). He had them collected later, it seems, and sent to the two French universities of Orleans and Paris. This was after their promulgation at a public consistory held in the castle of Monteaux (de Montiliis), near Carpentras, in southern France. This collection, for some reason or other, was revoked by Clement himself, and only after his death (1314) were these Decretals, which had meanwhile been revised by "more skilful" hands, promulgated by his successor,

[29] Schulte. *l. c.*, II, p. 4; Friedberg, *C. J. C.*, II, 935 f.

John XXII, in the Bull "Quoniam nulla," October 25th, 1317. This collection is styled in the manuscripts "*Liber Septimus*," but owing to the influence of the glossators, the title was soon changed into "Constitutiones Clementinae" or simply "Clementinae." [30]

2. Matter, Arrangement and Legal Value.— With the exception of two decretals, one of Urban IV and one of Boniface VIII, all the "*Clementinae*" belong to the first Pope of the so-called "Babylonian Captivity." These decretals are, like the two preceding collections, divided into five *books*, and these into *titles* and *chapters*, the sum total of the latter being 106. The *mode of quoting the Clementinae* is, with the exception of the characteristic sign "*Clem.*," the same as that of the Gregorian or Bonifacian Decretals, *viz.: c. 1, Clem. I, 2 de rescriptis* = chapter 1, Clementinae, book 1, title 2 de rescriptis; or, as in the ancient canonists, cap. Abbates, Clem. (de rescriptis, which is not seldom omitted).

John XXII in his Bull of publication commands the addressees to receive these Decretals with good will (*prompto affectu*) and to make use of them in future "in the courts and schools" (*in judiciis et scholis*). Hence the *Clementinae* enjoy the same *authentic* value as the decretals of Gregory IX and Boniface VIII. But it must be added that the other decretals which issued from the Apostolic See after the Bonifacian collection but not inserted or mentioned in the *Clementinae*, did not lose their legal value because the *Clementinae* contain

30 Cfr. Schulte, *Quellen*, II, 451 ff.; *Corpus Iuris Can.*, ed. Friedberg, II, Prol., pp. LVII ff. Joannes Andreae in his *glossa ad verbum "de caetero" in Const. "Quoniam nulla"* narrates that Clement V himself revoked the collection on account of some decretals being too long, others faulty, others unsuitable, and that these mistakes were then corrected by "more skilled hands"; that John XXII changed them cannot be proved.

no invalidating clause with regard to them, as was the case in the Bull of Boniface VIII, "Sacrosanctae."[31]

ARTICLE 5

EXTRAVAGANTES

1. Pope John XXII published several important constitutions, touching chiefly upon beneficiary subjects, not contained in the *Clementinae* and yet commented on by the glossators. Thus William de Monte Laudano had furnished "*glossae*" on three decretals of the aforesaid Pope: "*Sedes apostolica*," "*Suscepti regiminis*," and "*Execrabilis*," issued in the first year of John's pontificate (1317). Zenzelinus de Cassanis also composed glosses on these three constitutions and, besides, on seventeen others of the same Pontiff, in the year 1325. These *twenty* decretals became known as the "*Decretales extravagantes, quae emanaverunt post Sextum*," or later as "*Extravagantes Johannis XXII*." They were divided into 14 *titles* and 20 *chapters*.[32]

2. These "*Extravagantes*" were published by JOHN CHAPPUIS in 1501 and 1503, together with some other decretals which had emanated from the Holy See, from John XXII to Sixtus IV. Out of these materials Chappuis made a collection, which he called "*Extravagantes Communes*," in five *books* with *titles* and *chapters*. However, the fourth book (*De Matrimonio*) is missing, for lack of materials. The whole collection is poorly digested and cannot claim authenticity as a collection, though the decretals taken singly have the authority due to pontifical laws, as far as they are still in force (*v. g.*, "*Ambitiosae*" in III, 4).[33]

31 Laurin, *l. c.*, pp. 202 f.
32 Schulte, *op. cit.*, II, 59 f.
33 Laurin, *l. c.*, p. 202.

Mode of quoting:

c. 2, Extr. Joannis XXII, tit. I (suscepti regiminis), c. un. Extr. Comm. III, 4 (Ambitiosae).

ARTICLE 6

THE "CORPUS JURIS CANONICI"

After having considered the several collections which were all published after the art of printing had been invented, either in five or in three volumes, a word must be added concerning the whole body of them, known as "*Corpus Juris Canonici.*"

1. "*Corpus Juris*" was a term applied at first to any body of laws, and later, in the twelfth century, to the collection of civil laws.[34] In a Brief of Gregory XIII, "Quum pro munere pastorali," July 1, 1580, the collection containing the *Decretum Gratiani,* the *Decretales Gregorii,* the *Decretales Bonifacii,* the *Clementinae* and the two *Extravagantes* was styled "*Corpus Juris Canonici.*" Hence, in a *wider sense,* these five collections may be said to constitute the *Corpus.*

In the *strict sense,* however, the title can be applied only to the three *authentic* collections, *viz.:* to the Decretals of Gregory IX and Boniface VIII, and the *Clementinae.* The nomenclature "*Corpus Juris Canonici Clausum*" is arbitrary and without foundation.[35]

2. If we regard the *structure* or make-up of the C. J. C. in its strict sense, *i. e.,* of the three authentic collections, we find inscriptions prefixed to the single titles as well

34 Kipp, *Gesch. d. Quellen d. Röm. Rechts,* 1909, 168; v. Scherer, I, 270.

35 Benedict XIV, "*Jam fere sextus*" (*Bullarium,* ed. Mechlin, 1826, I, XIV); Laurin, *l. c.,* pp. 19, 25, 225 f.

as to the chapters, which latter, moreover, have summaries put immediately before the text.

a) Concerning the *inscriptions* above the *titles* there is a twofold class. Some exhibit simply the subject they treat of, *v. g., De Consuetudine* (I, 4), while others are longer and offer a clause or sentence complete in meaning, *v. g., "Ne sede vacante aliquid innovetur"* (X, III, 9). The former inscriptions have no legal value, whereas the latter have.

b) The *"summaria"* placed at the head of nearly every chapter are additions of the glossators and, therefore, destitute of legal value.

c) Neither legal nor historical merit can be attached to the *indications* of the *sources* whence the composer pretends to have borrowed his matter.

d) As to the *text* itself, juridical value can be attributed only to the *pars decisiva* or *dispositiva,* regardless of whether the source is genuine or spurious, but not to the narrative part or to the allegations of the contending parties.[36]

3. Mention must be made of the various *editions* of the *Corpus Juris Canonici* which are not all of equal authority.

a) *Authentic* is the edition published after the commission consisting of six cardinals and fifteen "doctors" had corrected the *C. J. C.* at the command of Gregory XIII in *Rome,* in 1582.[37] But the work of the "Correctores Romani," incomplete as it is, can claim only doctrinal value.[38] However, the Roman edition had the distinction that it could be quoted in the ecclesiastical courts as well as outside of them.[39]

36 Wernz, *Jus Decretalium,* I, 325 f.

37 Theiner, *l. c.*, app. I, pp. 3 f.

38 Laurin, *l. c.*, p. 69.

39 Greg. XIII., *"Quum pro munere,"* July 1, 1580; Friedberg, II, p. LXXXII.

b) Of purely *private authority* were the editions made by the brothers PIERRE and FRANÇOIS PITHOU, at Paris in 1687. The same holds good of the critical edition of JUSTUS H. BÖHMER, Halle, 1747, whose "emendations" are not always happy.[40] For official purposes these editions are useless.

Better and worthy of attention is the edition which EMIL FREDERICK RICHTER published at Leipsic in 1839. He used the Roman edition as basis and added textual corrections of his own. This edition can be safely used in practice, although it is not authentic.

A later critical edition is that of EMIL FRIEDBERG, published in two 4to volumes under the title, *Corpus Juris Canonici*. Vol. I, 1879, contains the *Decretum Magistri Gratiani*, Vol. II, 1881, the Decretals and Extravagantes. This edition is based on extensive MS. researches, but neglects the Roman edition and omits all glosses, though inserting the *partes decisae*.

40 Friedberg, II, XLII.

SECTION 3

SOURCES OF THE LAST PERIOD

1. After the golden age of Canon Law, resplendent with works and authors some of whom shall be mentioned later, there was a setting of the sun, until the *Council of Trent* seemed to breathe new life into the half-motionless frame of the Church at large and the skeleton of canonistic science in particular.

This gathering of learned men had, of course, for its chief aim a reform not of laws, but of morals. Still discipline and morals cannot easily be separated, and hence we see that the Council, especially in its third period, issued many important enactments bearing directly on Canon Law. These *decrees* form a real *source* of Canon Law. Pius IV confirmed them and ordained that, after they had been duly promulgated in the city of Rome, legal force should be attributed to them from the first day of May, 1564.[1]

2. But, surprising though it be, it is a fact that, at least to our knowledge, there exists *no authentic collection of these decrees.* Some private editions were even placed on the Index.

The most noteworthy editions are:

a) Aug. Barbosa's "*Collectanea Bullarii aliarumve Summ. PP. Constitutionum nec non Praecipuarum Decisionum, quae ab Apost. Sede et s. Congregationibus*

1 Constitutions of Pius IV: "*Sicut ad sacrorum,*" July 18, 1564; "*Benedictus Deus,*" Jan. 26, 1564. — The promulgation was made at the Lateran, St. Peter's, the Apost. Chancery, the Campo de' Fiori; exception was made for the "Tametsi" (c. 1, sess. 24 de ref. mat.).

S.R.E. usque ad a. 1633 emanaverunt," Lyons, 1634 (formerly on the Index).[2]

b) JOHN GALLEMART'S *"Concilium Tridentinum cum Declarationibus Cardinalium ejusdem Interpretum,"* ed. Guerra, Venetiis 1780, 2 Vols. (formerly on the Index).

c) RICHTER and SCHULTE'S *"Canones et Decreta Concilii Tridentini ex ed. Rom. a. 1834 repetiti,"* Berlin, 1864 (repr. Naples, 1869).[3]

3. Towards the close of the sixteenth century an attempt was made to gather the three authentic collections of Gregory IX, Boniface VIII, and Clement V into one body together with the decrees of the V Lateran and the Tridentine councils. Cardinal Pinello offered an undigested digest, which he styled *"Liber Septimus,"* to Clement VIII, in 1598, whence it was also called: *"Ssmi. D. N. Clementis P. VIII Decretales."* However, the Pope declined the offer and Pinello's work, though printed, was never promulgated.[4]

This was the last effort to codify the laws of the Church, until PIUS X, of happy memory (*"Arduum sane,"* March 19, 1904), instituted his commission, to which we owe the New Code.

4. After the Council of Trent (1563) the legislative activity of the Popes was by no means stayed. But this period, owing to a more intensified centralization, made it imperative for the Pontiff not to divide but rather to distribute his power among various tribunals and congregations which came into existence soon after the Council. Thus the channel of laws, as it were, was twofold: constitutions and decisions.

2 H. Reusch, *Der Index,* II, 74.

3 Concerning the history of the Council of Trent see Pallavicini, *Istoria del Concilio di Trento,* 1666; and *Concilium Tridentinum,* published by the Görresgesellschaft, Herder, 1901 ff.

4 Sentis, *Clem. VIII. Decretales,* 1870; v. Scherer, I, 275.

a) The *Constitutions* emanated chiefly in the form of Bulls, sometimes also in the form of Briefs, directly from the Pontiff and touched upon matters of importance for the Church at large. These have so far not been published in an authentic collection. All the so-called *Bullaria,* with the exception of that of Benedict XIV,[5] are of a purely private character. The chief *Bullaria* are:

α) L. Cherubini's *Bullarium seu Collectio Diversarum Constitutionum Multorum Pontificum a Gregorio VII usque ad Sixtum V,* Rome, 1586. The second and third editions of this work comprised the constitutions of the Popes from Leo I to Paul V, to which Angelus a Lantusca and John Paul a Roma added those from Urban VIII to Clement X (Rome, 1672).

And. Barberi and Alex. Spetia published the so-called *Continuatio Bullarii* (Clement XIII to Gregory XVI), Rome, 1825–57.[6] Here must also be mentioned the *Acta Pii IX,* 1854 ff. and the *Acta Leonis XIII,* 1881 ff., which, however, appear to lack authentic character, whilst the *Acta Pii X* (Vatican Press, 1907 ff.) are authentic and official.

β) *Bullarium Luxemburgense* (first printed at Geneva), or *Bullarium Magnum Romanum a Leone I ad Benedictum XIV,* 1717–28.

γ) *Turinense* (Al. Tomasetti), *Diplomatum et Privileg. S.R. Pont. a Leone I ad Clement. XII editio,* 1857–72, without critical discernment and with a great number of printing errors.

Mention must here be made of P. Coustant, *Epistolae RR. Pontificum a Clem. I ad Innoc. I,* Paris, 1721; And. Thiel, *Epistolae RR. PP. Genuinae ab Hilario ad Pelagium II,* 1868. Of value are also the *Regesta* edited by

5 "*Jam fere sextus,*" 1746, sent to Bologna University.

6 Coquelines, *Bullarum Amplissima Collectio,* Rome, 1739–44.

JAFFÉ, LÖWENFELD, PFLUGK-HARTUNG, EWALD-HARTMANN (Greg. I.), and P. F. KEHR.

b) The *decrees* and *decisions* of the *Roman Congregations,* especially those of the Congr. of the Council, were collected and published. The only *authentic collections,* however, are the following:

S. Rit. C. Decreta Authentica, Rome, 1898–1912, 6 Vols.

Collectanea S. C. de Propaganda Fide, Rome, 1907, 2 Vols.

The collection of decrees of the Congr. of the Council, which ran first under the name of "Libri Decretorum," from 1573 on were gathered in the *Thesaurus Resolutionum S.C.C.* 1718 (resp. 1745) to 1908, in 167 vols. Strictly private collections are ZAMBONI'S *Coll. Declarationum S.C.C.*, Atrebati, 1868, 4 Vols.; PALLOTINI, *Coll. Omnium Concl. et Resolv.,* 1564–84 (alphabetic); LINGEN and REUSS, *Causae Selectae,* Ratisbon, 1871. There are also many scattered volumes of decisions of the S. R. R.

STUDY OF CANON LAW [7]

It would be worth while to enter the studio of one of those learned canonists of the past in order to observe his way of studying, not only Canon Law, but also civil law, from which was borrowed the method of applying Canon Law (*"ordinem placitandi ex legibus"*). Then we might enter a law school and learn their manner of teaching. There, in the midst of hundreds of disciples,

7 Besides the authors mentioned above, the student may consult: Doujat, *Praenotionum Canonicarum libri quinque,* Venice, 1769; Sarti, O. Camal., *De Claris Archigymnasii Bononiensis Professoribus,* Rome, 1768, t. I; Savigny, *Geschichte des Röm. Rechts im Mittelalter,* 1834–54, Vols. III and IV.

eagerly intent on the teacher's words, a *Decretum* might be seen on the professor's table. First, with a sonorous voice, he reads the *summary* of the chapter he is about to expound. After that follows the *reading* of the *litera, i. e.,* the text of the chapter (or canon), with distinct accentuation and more slowly, that the students might be enabled to take down the wording in case they could not, because of poverty (books at that time were rare and expensive), or for other reasons, acquire the volume. Then the *litera,* if necessary,[8] is corrected, which was called *emendatio literae.* Hereupon the proper work of the teacher began — the *exposition* or expounding of the canon. This work comprised different acts: *Contradictions* were pointed out and solved by the method assigned by the " magister," then followed *casuistry* and corroboration of the explanation given and other *arguments* taken from the Decree or other sources.

The *students* under the supervision of the teacher are busy at work, engaged partly in *repetitions,* partly in *disputations.* The former are much like our modern " seminars," in which postgraduates or aspirants to the laurea expound some particular text more elaborately. *Disputations* were held *diebus Mercurii* (Wednesdays), and conducted in scholastic style — sometimes, we fear, to extravagance.

This method of training, if kept up from six to ten years, was apt to produce *thorough scholars* and future " masters," which title towards the end of the twelfth century was changed to *" doctors."* Note must be taken of the fact that the universities, being few in number, attracted the cream of professors and were efficient in maintaining a choice staff. The *clerical* character of

8 Cfr. Huguccio's *Glossa* on c. 31, C. 2, q. 6.

these flourishing schools, endowed by Popes and Bishops with benefices and other sources of revenue, was carefully maintained and proved no hindrance to effective teaching, intense study, and good morals.[9]

9 Cfr. Schulte, *Quellen*, I, pp. 111 ff.; 196; II, pp. 214 f., 493, etc.

SECTION 4

THE GLOSSATORS

If we call the epoch extending from the appearance of Gratian's *Decretum* to the Council of Trent the period of the Glossators, we look to the majority of writers (*denominatio fit a potiori*) without intending to exclude other writers and writings of a different kind.

1. Mention was made of the method the teachers were wont to employ in school. It was but natural that the work of the school should not be confined within the school-walls but also prove a fertile soil for literary products. These are, to a great extent at least, still preserved, either in the form of *Glossae,* or in the more stately shape of *Summae* and *Tractatus.*

In order of time the *Glossae* were the first literary output of the followers of the Master. A gloss [1] or verbal explanation was generally placed above the word to be explained, and therefor, called *glossa interlinearis.* Not rarely these glosses were placed on the margin or at the bottom of the page (*glossae marginales*). If continuously applied to the whole text of the Decree or the Decretals, such a series was styled *apparatus.*

Some authors, *v. g.* Bernardus Papiensis, preferred another way, *viz.:* that of writing commentaries, called *Summae.* These either followed the order of the text

1 From the Greek γλῶσσα (*lingua*); "*dicitur expositio sententiae literam continuans et exponens, unde dicitur glossa, i. e., lingua.*" Doujat, *l. c.*, l, V, c. 2, n. 2.

(Decree or Decretals) closely and uninterruptedly, or left the order of the text and exhibited only a summary, using the text for the sake of proof. In this latter case they might just as well be called *Tractatus,* although these, properly speaking, were rather essays on some particular subject (*v. g.* Durantis' "Ordo Judiciarius"). It is sometimes difficult to distinguish between *Summae* and *Tractatus.*[2] The glossators had the custom of distinguishing their glosses from those of others by certain initials or *sigla, v. g.* Huguccio used H., Bartholomaeus of Brescia, B. or Bart., etc.

2. We will name some of the most noteworthy glossators and authors of canonical works, retaining their Latin names, as they were then known. To the *Decretum* JOANNES FAVENTINUS composed an apparatus about 1179–87. CARDINALIS introduced the *jus civile* into the Decree. BAZIANUS (+ 1197) in his glosses employed the decretals. The famous "*Glossa Ordinaria*" was furnished by JOHANNES TEUTONICUS, about the year 1215. A rich glossary based upon the preceding and on the compilations is that of BARTHOLOMAEUS BRIXIENSIS, about 1240–45; it is the last gloss on the *Decretum.*[3]

The *Decretales Gregorii* were glossed by VINCENTIUS HISPANUS and BERNARDUS PARMENSIS DE BOTONE (+ 1263), whose *glossa* is called "*ordinaria.*"

The "*Liber Sextus*" and the "*Clementinae*" were adorned with the glosses of JOANNES ANDREAE (+ 1348), one of the most illustrious canonists, "*fons et tuba juris,*" as he was called.[4]

3. SUMMAE AND TRACTATUS.—An entire catalogue would be necessary to do justice to the galaxy of writers who flourished from the twelfth to the fifteenth

2 Schulte, *Quellen,* I, 219.
3 *Ib.,* I, 145, 191, 172; II, 86 f.
4 His daughter Novella also taught Canon Law,—but behind a curtain!

century. We select the best known without wishing to detract from the fame of the others. *Summa Magistri Rolandi* (Bandinelli), later Pope Alexander III;[5] *Summa Rufini,* about 1166; *Summa Stephani Tornacensis* (1203); *Summa Simonis de Bisiano,* made about 1174–79; *Summa Huguccionis,* about 1187; *Summa Bernardi Papiensis,* about 1191–98; this is a sort of compendium of Canon Law.[6]

What were called *Lecturae* were in fact commentaries, and might also be styled *Summae.* Such were composed by *Innocent IV* (Sinibaldus Fliscus, 1243–54), "*Apparatus in quinque libros Decretalium*"; Hostiensis (Henricus de Seguesia, + 1271), "*Lectura in Gregorii IX Decretales*"; Abbas Antiquus, "*Lectura seu Apparatus ad Decretales Gregorii IX,*" composed about 1270; Ægidius de Fuscarariis (1289); Joannes Garsias Hispanus (c. 1282); Guido de Baysio, "*Commentarius in Sextum*" (c. 1299–1312); Guilielmus de Monte Laudano (1343), "*Lecturae super Sextum, Clementinas et tres Extravagantes Joannis XXII*"; Zenzelinus de Cassanis (the same). Of great authority are the following: Petrus de Ancharano (1416), Franciscus de Zabarellis (1417), Antonius de Butrio (1408), Joannes ab Imola (1436), and especially Panormitanus, also called Nicolaus de Tudeschis, O.S.B., Abbas Modernus or Abbas Siculus (+ 1453),—all of whom composed commentaries on the Decretals and the *Clementinae.*

The following works rather resemble treatises or essays:

Bernardus Papiensis, "*Summa de Matrimonio;*" "*Summa de Electione;*" Tancred, "*Summa de Sponsalibus et Matrimonio,*" and "*Ordo Judiciarius;*" Wil-

[5] Ed. Thaner, 1874. [6] Ed. Laspeyres, 1860.

LIAM OF DURANT (1296), called "SPECULATOR," "*Speculum Legatorum*," "*Speculum Judiciale*," "*Rationale Divinorum Officiorum*."[7]

Some works are especially concerned with the *papal power*, which was, at times, rather insipidly defended. To this class belong: JOANNES PARISIENSIS (+ 1306), "*Tractatus de Regia Potestate et Papali*"; ÆGIDIUS ROMANUS (Colonna, + 1315), "*De Excellentia Pontificatus*," "*De Potestate Ecclesiastica libri tres*," "*De Regimine Principum*"; AUGUSTINUS TRIUMPHUS (+ 1328), "*Summa de Potestate Ecclesiastica*";[8] RODERIC SANCIUS DE AREVALO (+ 1470), "*Defensorium Status Ecclesiastici*," "*De Monarchia Orbis*" (the Pope is the monarch of the whole universe); JOHN A TURRECREMATA (+ 1468), "*De Potestate Papae et Concilii Generalis Auctoritate;*" THOMAS DE VIO (CAJETAN) (+ 1534), "*De Auctoritate et Potestate Rom. Pont.*," "*De Auctoritate Conciliorum.*" Of some interest are the works of DOMINICUS DE DOMINICIS (+ 1478), "*De Reformationibus Romanae Curiae*," "*De Cardinalium Electione et Legitima Creatione*," etc.[9]

7 Edited, respectively, by Wunderlich, 1841, and Bergmann, 1842.

8 Cfr. Scholz, *Publizistik zur Zeit Philipps des Schönen*, K.-R. Abhandl. v. Stutz, 1903, 618.

9 Cfr. Schulte, *Quellen*, II, passim.

SECTION 5

POST-TRIDENTINE LITERATURE

The reformation initiated by the Council of Trent was vigorously carried out by the later Popes, who proved themselves excellent legislators. The tendency of gravitation towards the centre became more accentuated. This is very noticeable in Canon Law. Besides this *centralizing* tendency there are two other characteristics which single out this period from those preceding. Humanism invaded the realm of law on a side where it was particularly vulnerable by introducing *historical criticism.* This operation was no detriment to the science, but it might have proved dangerous in the hands of an unskilful surgeon. It has produced works of great and lasting merit.

Another innovation, less necessary and rather cumbersome, is the *moralizing* strain now brought into Canon Law. This was a disadvantage because it obscured the character of the Church as a public society and made the law appear to be an appendix of the confessional. The moralists entered into the vineyard of Canon Law and — but *melius est silere quam loqui.*

The following list may serve students especially in their selection of canonical books. The works may be divided into historico-critical writings, commentaries, and manuals; those which, for one reason or another, are preferred at the Roman Curia are marked with an asterisk.

1. HISTORICO-CRITICAL WRITINGS

Besides the authors mentioned above the following may be recommended:

CARD. JOHN BAPTIST PITRA, O.S.B., "*Juris Ecclesiastici Graecorum Historia et Monumenta,*" Rome, 1864–68; "*Analecta Novissima Spicilegii Solesmensis,*" Tusculi, 1885; L. THOMASSIN, "*Vetus et Nova Eccles. Disciplina circa Beneficia,*" Magontiaci, 1787; E. LOENING, *Geschichte des deutschen Kirchenrechts,* 1878, 2 vols. (still a standard work).

2. COMMENTARIES

Although not a commentary in the proper sense, yet as embracing almost the whole range of Canon Law, we must mention the works of the "*Princeps Canonistarum,*"[1] BENEDICT XIV, whose *Opera Omnia* (Prati, 1839 ff.) are a rich source of information.

A. BARBOSA, *Opera Omnia,* Lugdun., 1660.

C. S. BERARDI, "*Commentaria in Jus Eccl. Universum,*" Taurini, 1766 (critical).

DE ANGELIS, "*Praelectiones Juris Canonici,*" Rome, 1877 ff.

L. FERRARIS, "*Prompta Bibliotheca Canonica,*" *etc.,* various editions, the latest by J. Bucceroni, S.J., Romae, 1885–99, 9 Vols., but with little improvement as to dates of the decisions of the S. Congregations.

*CARD. VINCENT PETRA (+ 1747), "*Commentaria in Constitutiones Apostolicas,*" Romae, 1705–1726, 5 Vols., besides "*De S. Poenitentiaria Apostolica,*" 1712.

E. PIRHING, S.J., "*Universum Jus Canonicum,*" Dillingae, 1674.

1 Cfr. Hurter, *Nomenclator,* 3rd ed., Innsbruck, 1910, Vol. IV, col. 1595 sqq.

PICHLER, S.J., "*Jus Can. Universum,*" Ingolstadii, 1735.

*ANACLETUS REIFFENSTUEL, O.F.Min., "*Jus Canonicum Universum,*" Antwerpiae, 1743, 3 Vols.

*JOHN BAPT. RIGANTI, "*Commentaria in Regulas, Constitutiones et Ordinationes Cancellariae Apostolicae,*" Romae, 1744 (an important work for the Rules of the Apostolic Chancery).

SANTI-LEITNER, "*Praelectiones Juris Canonici,*" Ratisbonae, 1898 f.

*F. SCHMALZGRUEBER, S.J., "*Jus Eccl. Universum,*" Romae, 1843 ff., 12 Vols.

*GONZALEZ TELLEZ, "*Commentaria perpetua in singulos textus quinque lib. decretal. Gregorii IX,*" Lugduni, 1673.

WERNZ, S.J., "*Jus Decretalium,*" Romae, 1898 ff.

JOHN BAPT. CARD. DE LUCA (+ 1683), "*Theatrum Veritatis et Justitiae*" (a prolix work of motley content), Romae, 1671 f., 18 Vols.*

3. MANUALS

AICHNER, "*Compendium Juris Eccl.,*" Innsbruck, 1895.

J. DEVOTI, "*Juris Canonici Universi Publ. et Privati libri quinque,*" Romae, 1803, 3 Vols. (still useful).

F. HEINER (S.R.R. Auditor), "*Katholisches Kirchenrecht,*" Paderborn, 1897.

JOS. LAURENTIUS, *S.J.*, "*Institutiones Juris Ecclesiastici,*" Freiburg, 1903.

G. PHILLIPS, "*Kirchenrecht,*" 1845 ff., 8 Vols.

VON SCHERER, "*Handbuch d. Kirchenrechts,*" Graz, 1886, 2 Vols. (incomplete, but very thorough and critical).

* For a list of commentaries written after the promulgation of the Code, see Appendix I, pp. 281 sqq. *infra.*

J. F. Schulte, "*Lehrbuch d. Kath. Kirchenrechts,*" 1863.

S. B. Smith, "*Elements of Ecclesiastical Law,*" 1891.

E. Taunton, *The Law of the Church,* London, 1906.

It may be permitted to add a few *Benedictine* authors.

Placidus Boekhn (+ 1752), "*Commentarius in Jus Canonicum Universum,*" 1735 f. (commentary-like and extensive).

*Lud. Engel (+ 1674 at Melk in Austria), "*Collegium Universi Juris Canonici,*" Salisburgi, 1671–74; Id., "*Tractatus de Privilegiis et Juribus Monasteriorum,*" *ibid.*

Martin Gerbert (S. Blasii, + 1793), "*Principia Theoriae Canonicae,*" 1758; "*De Communione Potestatis Ecclesiasticae inter Summos Ecclesiae Principes et Episcopos,*" 1761; "*De Legitima Ecclesiastica Potestate circa Sacra et Profana,*" 1761.

Rob. König (+ 1713), "*Principia Juris Can.,*" Salisburgi, 1691–97.

Maurus Schenkl (+ 1816), "*Institutiones Juris Eccl. Germaniae Accommodatae,*" Ingolstadii, 1760; Ratisbonae, 1853.

*Francis Schmier (+ 1728), "*Jurisprudentia Canonico-Civilis,*" Salisburgi, 1716.

Coel. Sfondrati (+ 1696), "*Regale Sacerdotium R. Pontifici Assertum,*" 1684; "*Gallia Vindicata,*" S. Galli, 1687.

Greg. Zallwein (+ 1766), "*Principia Juris Ecclesiastici Universalis et Particul. Germaniae,*" 1763 (considered one of the best manuals in its day).

CHAPTER V

OLD AND NEW LAW

So much on the old sources of Canon Law. The question next to be answered naturally concerns the *relation which the old Corpus Iuris Canonici,* and, in fact, the whole widely scattered material of ecclesiastical legislation *bears on the new Code of Canon Law.* We had occasion to notice some utterances with regard to decrees that have been issued during the pontificate of Pius, for instance, the decrees on Confession of Religious, etc., etc. Then there are the disciplinary decrees of the Council of Trent and papal constitutions, for instance, Leo XIII, "*Romanos Pontifices,*" 1881, "*Conditae,*" 1900, his "*Officiorum ac munerum,*" 1897. Are all these sources obsolete? The answer must be affirmative. They belong to the history of canonical sources, and to nothing else.[1] The Code is the one authentic source of the Catholic Church, *unicus et authenticus fons.*[2]

It is indeed true that the *material law* has not been changed in such a way that an entirely new epoch in the discipline of the Church has now been ushered in, or that every connection with the former law has been severed. But the *formal law,* the wording of the text, as it is in the Code, is *now the only* source of canonical discipline.

1. Therefore, says n. 1 of can. 6: "All laws, both universal and particular, which are opposed to the laws pre-

1 See Stutz U. *Der Geist des Codex Juris Canonici,* Stuttgart 1918, p. 163.

2 *S. C. Semin. et Univ.,* Aug. 7th, 1917. (*A. Ap. S.,* LX, 439.)

scribed in the Code, are abrogated, with the exception of those particular laws for which express provision is made." Universal laws which oblige the whole *Latin Church* are, therefore, to be sought only in the Code, nor is it necessary to look for any other source, at least for juridical purposes. For can. 6, n. 6, explicitly states that all other disciplinary laws thus far in force, if they are neither explicitly nor implicitly contained in this Code, must be held to have lost their obligatory force. This was precisely one of the chief objects set for the Codification Commission.[3]

The disciplinary laws of the Tridentine Council are changed as well as "*Speculatores*" of Innocent XII, the "*Ad militantis*" of Benedict XIV, etc., etc. But the laws referred to in the Code, especially "*Cum illud*" and the "*Sacramentum Poenitentiae*" of Benedict IV, are retained, even though they were not universal laws.[4]

Particular laws are also abolished by the Code, "unless express provision" is made for their retention. This is most noteworthy with regard to our *Baltimore councils,* whose enactments are strictly of the nature of particular laws. Take, for instance, our parishes which were, at least most of them, not canonical parishes. The Code has raised them to the rank of such, provided the requirements are verified. That there are things in our Plenary councils[5] which are not opposed to the Code, goes without saying. A very important instance of the extent of this canon 6 is the Bull "*Provida,*" of 1906, issued for Germany, as compared with can. 1099, which manifestly

3 Pius X, "*Arduum sane,*" March 19th, 1904.

4 See can. 459. § 4; can. 884.

5 We suppose the Maynooth synods will share the fate of our plenary councils. With disgust we reject the insinuation of Bolshevism thrown at us in a certain magazine. We abhor this as well as any revolutionary movement, and also Bolshevistic criticism.

abstains from any special provision.[6] Particular laws are also such as regulate chapters of canons, to which reference is made in our code more than once.[7] Furthermore, particular or special laws are referred to in the section on religious whose constitutions are often safeguarded.[8] But even these stand only as far as not opposed to the Code.

2. Three sections of can. 6 refer to the *manner and method in which the old law may be used,* provided always that the old law or rather its reading is not the source, the *fons essendi,* but only the *fons cognoscendi.*

a) If the old law has passed unchanged into the Code, it must be understood according to the authority, *i. e.,* the mind of the former lawgiver, of the old law. Thus also the interpreters of the old laws may be employed as aids to their understanding. There are not many texts in our Code which repeat the old law without some change. One of them is can. 884 concerning the *absolutio complicis.* Then there is can. 2351, which is almost a verbal transcription from former sources.

b) A *canon of the Code may partly agree and partly disagree with the old law.* In this case the part conforming to the old law must be understood in the light of the old law; but the part differing from the old law should be taken in its own sense and wording. Compare, for instance, can. 1172, § 2 with can. un. 6°, V, III, 21; can. 2271, n. 2 with cap. *Alma* 24, 6°, V, 11.

c) Again, *when there is doubt whether an enactment of the Code differs from the old law, the latter must be upheld* (can. 6 n. 4). There is more than one passage in our Code which may cause such a doubt. We say this with all respect due to the sovereign lawgiver and the framers of the Code. The very fact that a special com-

6 Stutz, *l. c.,* p. 100.

7 See *e.g.,* can. 379, etc.; also can. 1525, § 2.

8 Can. 489, *et passim.*

mission for authentic interpretation is needed is sufficient proof that not every canon is as clear as daylight. See, for instance, can. 613, concerning privileges, can. 516, regarding the counsellors, as compared with the decree "*De debitis,*" 1909; also the well-known can. 1070.

3. Finally, with regard to the *Penal Code,* can. 6, n. 5, reads as follows: "*All penalties not mentioned in this Code,* of whatever description, spiritual or temporal, corrective or vindictive, whether *ferendae* or *latae sententiae, are hereby abrogated.*" This section alone, if nothing else, would palpably prove the great benefit bestowed by the Code on those who govern the Church as well as on those who are governed, and also on the canonists. For with the exception of the "*Apostolicae Sedis,*" 1869, which, however, reformed only censures, no collection of ecclesiastical penalties had ever been attempted.

It remains but to point out the *division of the New Code.* The five books remind the student of the time-honored number of the Decretals. However, a mere glance at the Code will also convince him that the real principle of division points towards that of the *Institutes* of Gajus: *personae, res, actiones,* or imitates that of Lancelotti's *Institutiones: personae, res, iudices, crimina.* The Code reduces the more juridical matter to the *Normae Generales,* which are found in Book I, followed by the 639 canons on Ecclesiastical Persons, the subject of Book II. By far the largest part, can. 726–1551, is taken up by Book III, inscribed: "*De Rebus.*" Book IV treats in can. 1552–2194 of Ecclesiastical Trials, and finally can. 2195–2414 constitute the Penal Code of the Church.[9]

9 Stutz, *l. c.,* § 15 f., p. 38 f.

CONSTITUTION "PROVIDENTISSIMA" OF BENEDICT XV, PROMULGATING THE NEW CODE

To Our Venerable Brethren and Beloved Sons the Patriarchs, Primates, Archbishops, Bishops, and Other Ordinaries, and also to the Professors and Students of the Catholic Universities and Seminaries

BENEDICT, BISHOP

SERVANT OF THE SERVANTS OF GOD

FOR A PERPETUAL REMEMBRANCE OF THE MATTER

The most provident of mothers, the Church, enriched by her Divine Founder with all the notes befitting a perfect society, from the very beginning of her existence, when, obeying the mandate of the Lord, she commenced to teach and govern all nations, undertook to regulate and safeguard the discipline of the clergy and the Christian people by definite laws.

In process of time, however, particularly when she achieved her freedom and grew greater and more widespread from day to day, she never ceased to develop and unfold the right of making laws, which belongs to her by her very constitution. She did this by promulgating numerous and various decrees emanating from the Roman Pontiffs and Ecumenical Councils, as events and times suggested. By means of these laws and precepts she made wise provision for the government of the

clergy and Christian people, and, as history bears witness, wonderfully promoted the welfare of the State and civilization. For the Church was at pains not only to abrogate the laws of barbarous nations and to reduce their rude customs to civilized form, but, trusting in the assistance of the divine light, she tempered the Roman law itself, that wonderful monument of ancient wisdom, which has deservedly been called "written reason," and, having corrected its defects, perfected it in a Christian manner to such a degree that, as the ways of public and private life tended to greater perfection, abundant materials were supplied for the making of new laws both in the Middle Ages and more recent times.

However, owing to changes in the circumstances of the times and the necessities of men, as Our Predecessor of happy memory, Pius X, wisely declared in his Motu proprio "*Arduum sane,*" of March 17, 1904, Canon Law, no longer achieved its end with sufficient speed. For in the passing of centuries a great many laws were issued, of which some were abrogated by the supreme authority of the Church or fell into desuetude, while others proved too difficult to enforce, as times changed, or ceased to be useful to the common good. To these objections must be added that the laws of the Church had so increased in number and were so separated and scattered, that many of them were unknown, not only to the people, but to the most learned scholars as well.

Moved by these reasons, Our Predecessor of happy memory, at the very beginning of his Pontificate, considering how useful it would be for the restoration and strengthening of ecclesiastical discipline, if the serious inconveniences enumerated above were removed, decided to gather together and to digest with order and clearness all the laws of the Church issued down to our own day,

removing all that were abrogated or obsolete, adapting others as far as needful to the necessities and customs of the present time,[1] and making new ones according as the need and opportunity should direct. When, after mature deliberation, he put his hand to this most difficult enterprise, he deemed it necessary to consult with the Bishops, whom the Holy Ghost has chosen to rule the Church of God, and to ascertain fully their views on the matter. Accordingly, he directed that, by letter from the Cardinal Secretary of State, all the Archbishops of the Catholic world should be invited to consult with their suffragan Bishops and other Ordinaries obliged to take part in Provincial Councils, and, after such consultation, to report to this Holy See what parts of the existing ecclesiastical law in their opinion stood in need of change or correction.[2]

Then, after having called upon numerous experts in Canon Law residing in Rome and other places to collaborate in the undertaking, he commanded Our Beloved Son, Cardinal Gasparri, then Archbishop of Caesarea, to direct, perfect, and, as far as necessary, complete the work of the consultors. He also instituted a Commission of Cardinals, naming as its members Cardinals Dominic Ferrata, Casimir Gennari, Benjamin Cavicchioni, Joseph Calasanctius Vives y Tuto, and Felix Cavagnis, who, in accordance with the suggestions of Our Beloved Son Cardinal Gasparri, should diligently examine the proposed canons, and change, correct, and perfect them as their judgment directed.[3] When these five men passed away, one after the other, there were appointed in their places Our Beloved Sons Cardinals Vincent Vannutelli,

1 Cfr. the Motu proprio *"Arduum sane."*

2 Cfr. the Epistle *"Pergratum mihi,"* of March 25, 1904.

3 Cfr. the Motu proprio *"Arduum sane."*

Cajetan De Lai, Sebastian Martinelli, Basil Pompili, Cajetan Bisleti, William Van Rossum, Philip Giustini, and Michael Lega, who have admirably completed the work confided to them.

Finally, after again consulting the prudence and authority of all his Venerable Brethren in the Episcopate, he directed that to them and to all the Superiors of the Regular Orders, who are accustomed to be summoned to an Ecumenical Council, should be sent copies of the new Code finished and corrected, before promulgation, in order that they might freely manifest their observations on the proposed canons.[4]

But since, meanwhile, to the sorrow of the whole Catholic world, Our Predecessor of immortal memory passed out of this life, it became Our duty, as soon as by the secret will of Providence we began Our Pontificate, to receive with due honor the views thus collected from every quarter of those who with Us form the teaching Church. Then finally we acknowledged in all its parts, approved, and ratified the new Code of the whole of Canon Law, which had been petitioned for by many Bishops at the Vatican Council, and begun more than twelve years ago.

Therefore, having invoked the aid of Divine grace, and relying upon the authority of the Blessed Apostles Peter and Paul, of Our own accord and with certain knowledge, and in the fullness of the Apostolic power with which we are invested, by this Our Constitution, which we wish to be valid for all time, We promulgate, decree, and order that the present Code, just as it is compiled, shall have from this time forth the power of law for the Universal Church, and We confide it to your custody and vigilance.

4 Cfr. the Epistle "*De Mandato*," of March 20, 1912.

But in order that all concerned may be able to have a thorough knowledge of the regulations of the Code before they begin to be binding, We ordain that they shall not come into effect until Pentecost day next year, *i. e.*, May 19th, 1918.

Notwithstanding all contrary regulations, constitutions, privileges, even those worthy of special and individual mention, and notwithstanding contrary customs, even though they be immemorial, or whatever else may run counter to this Constitution.

For no one, therefore, is it lawful willingly to contradict or rashly to disobey in any way this Our constitution, ordination, limitation, suppression or derogation. If any one should dare to do so, let him know that he will incur the wrath of Almighty God and of the Blessed Apostles Peter and Paul.

Given at Rome, from St. Peter's, on the Feast of Pentecost of the year one thousand nine hundred and seventeen, the third year of Our Pontificate.

PETER CARD. GASPARRI,
Secretary of State

O. CARD. CAGIANO DE AZEVEDO,
Chancellor of the H. R. Church.

PROFESSION OF FAITH PRESCRIBED BY THE NEW CODE

Ego *N.* firma fide credo et profiteor omnia et singula, quae continentur in symbolo Fidei, quo sancta Romana Ecclesia utitur, videlicet: Credo in unum Deum, Patrem omnipotentem, factorem caeli et terrae, visibilium omnium et invisibilium. Et in unum Dominum Iesum Christum, Filium Dei Unigenitum. Et ex Patre natum, ante omnia saecula.— Deum de Deo, lumen de lumine, Deum verum de Deo vero. Genitum non factum, consubstantialem Patri: per quem omnia facta sunt. Qui propter nos homines, et propter nostram salutem descendit de caelis. Et incarnatus est de Spiritu Sancto ex Maria Virgine, et Homo factus est. Crucifixus etiam pro nobis, sub Pontio Pilato: passus, et sepultus est. Et resurrexit tertia die, secundum Scripturas. Et ascendit in caelum: sedet ad dexteram Patris. Et iterum venturus est cum gloria iudicare vivos, et mortuos: cuius regni non erit finis. Et in Spiritum Sanctum, Dominum et vivificantem: qui ex Patre Filioque procedit. Qui cum Patre et Filio simul adoratur, et conglorificatur: qui locutus est per prophetas. Et Unam, Sanctam, Catholicam et Apostolicam Ecclesiam. Confiteor unum Baptisma in remissionem peccatorum. Et exspecto resurrectionem mortuorum. Et vitam venturi saeculi. Amen.

Apostolicas et ecclesiasticas traditiones, reliquasque eiusdem Ecclesiae observationes et constitutiones firmissime admitto et amplector. Item sacram Scripturam iuxta eum sensum, quem tenuit et tenet sancta Mater

Ecclesia, cuius est iudicare de vero sensu et interpretatione sacrarum Scripturarum, admitto; nec eam unquam, nisi iuxta unanimem consensum Patrum, accipiam et interpretabor.

Profiteor quoque septem esse vere et proprie Sacramenta novae legis a Iesu Christo Domino nostro instituta, atque ad salutem humani generis, licet non omnia singulis, necessaria, scilicet, Baptismum, Confirmationem, Eucharistiam, Poenitentiam, Extremam Unctionem, Ordinem et Matrimonium; illaque gratiam conferre, et ex his Baptismum, Confirmationem et Ordinem sine sacrilegio reiterari non posse.— Receptos quoque et approbatos Ecclesiae Catholicae ritus in supradictorum omnium Sacramentorum sollemni administratione recipio et admitto.— Omnia et singula quae de peccato originali et de iustificatione in sacrosancta Tridentina Synodo definita et declarata fuerunt, amplector et recipio.— Profiteor pariter in Missa offerri Deo verum, proprium et propitiatorium Sacrificium pro vivis et defunctis; atque in sanctissimo Eucharistiae Sacramento esse vere, realiter et substantialiter Corpus et Sanguinem una cum anima et divinitate Domini nostri Iesu Christi, fierique conversionem totius substantiae panis in Corpus, et totius substantiae vini in Sanguinem, quam conversionem Catholica Ecclesia Transsubstantiationem appellat. Fateor etiam sub altera tantum specie totum atque integrum Christum, verumque Sacramentum sumi.— Constanter teneo Purgatorium esse, animasque ibi detentas fidelium suffragiis iuvari. Similiter et Sanctos una cum Christo regnantes venerandos atque invocandos esse, eosque orationes Deo pro nobis offerre, atque eorum Reliquias esse venerandas. Firmiter assero imagines Christi ac Deiparae semper Virginis, necnon aliorum Sanctorum habendas et retinendas

esse, atque eis debitum honorem ac venerationem impertiendam.— Indulgentiarum etiam potestatem a Christo in Ecclesia relictam fuisse, illarumque usum Christiano populo maxime salutarem esse affirmo.— Sanctam, Catholicam et Apostolicam Romanam Ecclesiam, omnium Ecclesiarum matrem et magistram agnosco, Romanoque Pontifici beati Petri Apostolorum Principis successori ac Iesu Christi Vicario veram obedientiam spondeo ac iuro.

Cetera item omnia a sacris Canonibus et Oecumenicis Conciliis, ac praecipue a sacrosancta Tridentina Synodo et ab Oecumenico Concilio Vaticano tradita, definita ac declarata, praesertim de Romani Pontificis primatu et infallibili magisterio, indubitanter recipio atque profiteor, simulque contraria omnia, atque haereses quascunque ab Ecclesia damnatas et reiectas et anathematizatas, ego pariter damno, reiicio et anathematizo. Hanc veram Catholicam Fidem, extra quam nemo salvus esse potest, quam in praesenti sponte profiteor et veraciter teneo, eandem integram et inviolatam usque ad extremum vitae spiritum, constantissime, Deo adiuvante, retinere et confiteri, atque a meis subditis seu illis, quorum cura ad me in munere meo spectabit, teneri et doceri et praedicari, quantum in me erit curaturum, ego idem *N.* spondeo, voveo ac iuro. Sic me Deus adiuvet, et haec sancta Dei Evangelia.

PART II
COMMENTARY

BOOK I

GENERAL RULES

CAN. 1

Licet in Codice iuris canonici Ecclesiae quoque Orientalis disciplina saepe referatur, ipse tamen unam respicit Latinam Ecclesiam, neque Orientalem obligat, nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt.

Though the discipline of the Oriental Church is often referred to in the Code of Canon Law, the Code itself regards only the Latin Church and does not bind the Oriental Church except in matters which of their very nature concern also the latter.

In other words, the new Code binds the Oriental Church only in so far as its dicipline is expressly mentioned therein.

This point was decided in 1907 by the Sacred Congregation of the Propaganda in a decree which touches upon the binding force of the Constitutions of the Holy See.[1]

1 Cf. *Collectanea P. F.*, 1907, II, n. 1578.

This decree establishes that laws emanating from the Holy See are binding upon the Oriental Church,

a) if they concern matters of faith or morals;

b) if they contain matters connected with the divine or the natural law, *e. g.*, the application of Holy Mass for the people at least sometimes during the year;

c) if the laws themselves expressly state that they are meant to bind the Oriental Church.

The Oriental Churches are distinguished from the Latin Church by their respective liturgical rites,[2] whilst in faith or dogma they are united with the Roman Pontiff. To the Oriental Church belong eight large groups with their respective subdivisions: the Byzantine Uniats with the Melchites, the Ruthenians, the Bulgarians, the Rumanians, the Italo-Greeks (in Calabria and Sicily), the Chaldees, the Copts, the Abyssinians, the Catholic Syrians, the Maronites, and the Armenians and Uniats of Malabar. The Oriental Catholics living in the U. S. remain subject to their respective Church, so far as rite is concerned, but in disciplinary matters, *v. g.*, celibacy of the clergy, they follow the Latin Church.

Can. 2

Codex, plerumque, nihil decernit de ritibus et caeremoniis quas liturgici libri, ab Ecclesia Latina probati, servandas praecipiunt in celebratione sacrosancti Missae sacrificii, in administratione Sacramentorum et Sacramentalium aliisque sacris peragendis. Quare omnes liturgicae leges vim suam retinent, nisi earum aliqua in Codice expresse corrigatur.

2 Cf. *Cath. Encyclopedia*, Vol. V, *s. v.* Eastern Churches. The Orientals also gain indulgences like the Latins (S. Poenit., 7 July, 1917, *A. Ap. S.*, 1917, ix, p. 399).

The Code, furthermore, decrees nothing about the rites and ceremonies which the liturgical books approved by the Latin Church prescribe for the celebration of the most holy Sacrifice of the Mass, the administration of the Sacraments and sacramentals, and other sacred functions. Hence all liturgical laws retain their force unless expressly corrected in the Code.

See Introduction, *supra,* pp. 60 sqq.

CAN. 3

Codicis canones initas ab Apostolica Sede cum variis Nationibus conventiones nullatenus abrogant aut iis aliquid obrogant; eae idcirco perinde ac in praesens vigere pergent, contrariis huius Codicis praescriptis minime obstantibus.

The canons of the Code in no wise abrogate or derogate from the agreements entered into between the Apostolic See and different nations; these agreements therefore remain in full force, notwithstanding contrary prescriptions of the Code.

This canon is evidently intended for those countries which maintain a so-called diplomatic or juridical relation with the Holy See. Where there is complete separation between Church and State, this canon does not apply, and hence the United States and England are not directly affected. We say *directly;* for, if one of the countries in which the aforesaid separation prevails should acquire a territory, or part thereof, which had a

concordat with the Holy See, it would be obliged to abide by the concordat until the case could be legally settled with the Apostolic See (Congregation of Extraordinary Affairs).[3] An instance of an amicable settlement is that with the United States concerning the Philippine Islands.

CAN. 4

Iura aliis quaesita, itemque privilegia atque indulta quae, ab Apostolica Sede ad haec usque tempora personis sive physicis sive moralibus concessa, in usu adhuc sunt nec revocata, integra manent, nisi huius Codicis canonibus expresse revocentur.

Rights otherwise acquired, as well as privileges and indults hitherto granted by the Apostolic See either to individuals or to organizations remain intact if they are still in use and have not been revoked, unless expressly revoked in the canons of this Code.

The rights here mentioned are the so-called *jura quaesita,*[4] *i. e.,* the legally acquired subjective rights of a third person. For instance, a bishop has the right of appointing one to a certain office; hence, though a corporation (monastery) has the right of appointing one of its members, this appointee must be presented to the Ordinary. *Indults* are faculties granted by the Holy See, *e. g.,*

3 A concordat (*conventio*) is a mutual agreement entered into between the Apostolic See and a State regarding matters which concern both parties, and is of the nature of a bilateral contract; cf. our *Summa Iuris Eccl. Publici,* 1910, p. 138 f.; there is no reason to relinquish that notion.

4 Cfr. the saying: "*Ius quaesitum fortius est quam ius quaerendum.*" Cf. Barbosa, *Tractatus Varii,* Axioma 135, ed. Lugd. 1660, p. 89.

the triennial faculties. These remain unchanged unless the Code expressly abolishes them, and consequently all faculties obtained before the promulgation of the Code and not expressly abolished therein remain in vigor until they lapse.

CAN. 5

Vigentes in praesens contra horum statuta canonum consuetudines sive universales sive particulares, si quidem ipsis canonibus expresse *reprobentur,* tanquam iuris corruptelae corrigantur, licet sint immemorabiles, neve sinantur in posterum reviviscere; aliae, quae quidem centenariae sint et immemorabiles, tolerari poterunt, si Ordinarii pro locorum ac personarum adiunctis existiment eas prudenter submoveri non posse; ceterae suppressae habeantur, nisi expresse Codex aliud caveat.

Such customs, whether universal or particular, as are now in vogue contrary to the prescriptions of these canons, if they are expressly reprobated by the canons, should be amended as corruptions of the law, even though they be immemorial, and should not be allowed to revive in future; others, which are of century-long duration and immemorable, may be tolerated if the Ordinaries, with due regard to places and persons, consider that they cannot be prudently abolished; the rest shall be regarded as suppressed, unless the Code expressly provides otherwise.

On privileges and customs see *infra,* under the respective titles.

Can. 6

Codex vigentem huc usque disciplinam plerumque retinet, licet opportunas immutationes afferat. Itaque:

1.° Leges quaelibet, sive universales sive particulares, praescriptis huius Codicis oppositae, abrogantur, nisi de particularibus legibus aliud expresse caveatur;

2.° Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi;

3.° Canones qui ex parte tantum cum veteri iure congruunt, qua congruunt, ex iure antiquo aestimandi sunt; qua discrepant, sunt ex sua ipsorum sententia diiudicandi;

4.° In dubio num aliquid canonum praescriptum cum veteri iure discrepet, a veteri iure non est recedendum;

5.° Quod ad poenas attinet, quarum in Codice nulla fit mentio, spirituales sint vel temporales, medicinales vel, ut vocant, vindicativae, latae vel ferendae sententiae, eae tanquam abrogatae habeantur;

6.° Si qua ex ceteris disciplinaribus legibus, quae usque adhuc viguerunt, nec explicite nec implicite in Codice contineatur, ea vim omnem amisisse dicenda est, nisi in probatis liturgicis libris reperiatur, aut lex sit iuris divini sivi positivi sive naturalis.

The Code for the most part retains the discipline hitherto in force, but makes some opportune changes. Thus:

1.° All laws, whether universal or particular, that are opposed to the prescriptions of this Code, are abrogated, unless some special provision is made in favor of particular laws;

2.° Those canons which restate the ancient law without change, must be interpreted upon the authority of the ancient law, and therefore in the light of the teaching of approved authors;

3.° Those canons which agree with the ancient law only in part, must be interpreted in the light of the ancient law in so far as they agree with it, and in the light of their own wording in so far as they differ from the ancient law;

4.° When it is doubtful whether a canon contained in this Code differs from the ancient law, the ancient law must be upheld;

5.° As regards penalties not mentioned in the Code, whether spiritual or temporal, medicinal or (as they say) vindictive, whether incurred by the act itself or imposed by judicial sentence, they are to be considered as abrogated;

6.° If there be one among the other disciplinary laws hitherto in force, which is neither explicitly nor implicitly contained in this Code, it must be held to have lost all force unless it is found in approved liturgical books or unless it is of divine right, positive or natural.

This canon establishes the relation between the old and the new law of the Church, as explained in the Introduction to this Commentary, *supra,* pp. 60 sqq.

CAN. 7

Nomine Sedis Apostolicae vel Sanctae Sedis in hoc codice veniunt non solum Romanus Pontifex, sed

etiam, nisi ex natura rei vel sermonis contextu aliud appareat, Congregationes, Tribunalia, Officia, per quae idem Romanus Pontifex negotia Ecclesiae universalis expedire solet.

By the term " Apostolic See " or " Holy See " in this Code is meant not only the Roman Pontiff, but also, unless a different meaning follows from the nature of the thing or the context, the Congregations, Tribunals, and Offices by means of which the Roman Pontiff is wont to transact the affairs of the universal Church.

TITLE I

ON ECCLESIASTICAL LAWS

DEFINITION AND NATURE

An ecclesiastical law may be defined as "a stable ordinance in accordance with reason, promulgated by the legitimate authority for the common welfare of the Church."[1] It is evident that a law spells stability and should always be based upon the dictates of reason, which requires that circumstances of person, time, and place should be duly considered.

Promulgation of ecclesiastical laws is necessary because, and in so far as, the will of the legislator must, in some way or other, be manifested to his subjects.[2]

The *mode of promulgation* depends on the legislator himself, and consequently is subject to change. Formerly ecclesiastical laws were promulgated in the City of Rome, at the gates of St. John Lateran, at St. Peter's, at the Apostolic Chancery and the Campo de' Fiori. The "Tametsi" had to be promulgated in every parish. Now an ecclesiastical law is sufficiently promulgated when it is published in the *Acta Apostolicae Sedis.*

CAN. 8

§ 1. Leges instituuntur, cum promulgantur.

1 Accommodated from the definition of law in general by St. Thomas, *S. Theol.*, 1a 2ae, qu. 90, a. 4.

2 It would be subversive of authority, as all canonists maintain (cf. the commentaries on tit. II Decretal.) to assert that the validity and obligatory force of laws depends on their acceptance by the people or clergy.

§ 2. **Lex non praesumitur personalis, sed territorialis, nisi aliud constet.**

§ 1. Laws go into effect when they are promulgated.

§ 2. A law is not presumed to be personal, but territorial, unless the contrary is evident.

CAN. 9

Leges ab Apostolica Sede latae promulgantur per editionem in *Actorum Apostolicae Sedis commentario officiali,* nisi in casibus particularibus alius promulgandi modus fuerit praescriptus; et vim suam exserunt tantum expletis tribus mensibus a die qui *Actorum* numero appositus est, nisi ex natura rei illico ligent aut in ipsa lege brevior vel longior vacatio specialiter et expresse fuerit statuta.

The laws enacted by the Apostolic See are promulgated by being published in the official *Acta Apostolicae Sedis,* unless some other mode of promulgation is prescribed in particular cases; and they become obligatory three months after the date affixed to the number of the *Acta* in which they appear, unless the nature of the law requires that it take effect immediately, or unless the law itself especially and expressly fixes a shorter or longer period.

Accordingly, a law published in the *Acta Apostolicae Sedis* bearing date of August 1, 1918, goes into effect at midnight Oct. 31 to Nov. 1, 1918.

CAN. 10

Leges respiciunt futura, non praeterita, nisi nominatim in eis de praeteritis caveatur.

Laws affect the future, not the past, unless it is expressly stated therein that they are retroactive.

The Pontifical Commission for the Authentic Interpretation of the Code has decided as follows in two instances: With regard to *engagements and marriages* the canons are not retro-active, and they do not revalidate (as it were automatically) a marriage invalidly contracted before the Code on account of former diriment impediments now abolished by the Code.

Religious who made their simple profession before the Code went into effect (May 19th, 1918) are, in case of dismissal, to be judged according to the former laws, not the Code (June 2–3, 1918; Oct. 16th, 1919, *A. Ap. S.*, X, 346; XI, 476; XVIII, pp. 11–13, 54).

LEGISLATORS IN THE CHURCH

Although the Code in its general rules does not mention the persons who are empowered to issue laws, it is safe to state that the following are ecclesiastical lawgivers:

1. The *Supreme Pontiff,* who in matters subject to ecclesiastical legislation may issue laws binding the whole Church. This he may do without or with his counsellors, through official organs, or personally.

2. The *Bishops* or Ordinaries, respectively, are entitled to issue laws for their respective territories. Their laws must be in conformity with the general laws or go beyond them; but without special commission or facul-

ties Bishops or Ordinaries are not empowered to issue laws *contrary* to the general law. Their legislative activity may be exercised either in synod or without.

3. *Superiors* of *communities* of *regulars* (with solemn vows), especially Generals, enjoy legislative power co-extensive with the power granted by the Supreme Pontiff and the Constitutions of their orders.

Other superiors of religious communities, if not exempt, cannot be said to possess legislative power, properly so called, although they may issue statutes and precepts.

OBLIGATION OF LAWS

In order to determine the obligatory force of a law, it must be noticed, as we have already stated, that a difference exists between divine (positive) and human laws. We may safely say that all moral laws which are based on the dictates of reason, have been laid down in Holy Writ. However, there are also positive divine laws which, *per se,* do not regulate the morality of acts, but determine the constitution of the Church and the Sacraments or the essentials of divine worship. These positive divine laws are out of the reach of human legislation and subject only to declaration or interpretation. They receive their obligatory force from divine law, natural and positive, and bind all the members of the Church without further injunction. Such laws evidently have no territoral limits. It is otherwise with *positive human laws,* which admit of distinction. Hence § 2 of Canon 8 (*supra*) says that a law must be presumed to be not personal but territorial, unless the contrary is evident, as, for instance, in case of the law prescribing the recital of the Breviary, which is manifestly personal.

Considering the *intrinsic* force of the obligation im-

posed by ecclesiastical law, we must make a distinction between merely prohibitive and nullifying laws. A merely *prohibitive* law renders an act against that law illicit, and this may be stated in barren terms, affecting merely conscience; or it may prohibit an act under penalty. In the former case we speak, with the old Roman jurisconsults, of a *lex minus quam perfecta,* in the latter of a *lex perfecta,* which has a penal sanction attached.

There is another species of laws, called *irritantes* or *inhabilitantes,* which are nothing else but *nullifying* laws, *viz.,* such as render an act committed contrary to them null and void (*lex plus quam perfecta*).

Now the Code says:

CAN. 11

Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur.

Only those laws are to be considered as nullifying which state in express or equivalent terms that either the act is null and void or that a [certain] person is incapable [of performing a valid act against the law].

Thus, *e. g.,* the first degree of consanguinity renders a marriage null and void, whilst the attempted marriage of one *in sacris* is null by reason of the incapability of the person, expressly so declared. *Equivalent* means equal in force or significance so far as concerns the matter under consideration.

(Canons 12, 13, 14, and 15, *infra* pp. 87 sqq.)

The subject of nullifying laws is continued in Canon 15.

CAN. 15

Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet.

Laws, even such as are nullifying or disqualifying, do not oblige in case of doubt which affects the law; if the doubt concerns a fact, the Ordinary may dispense, provided the law is one of those from which the Roman Pontiff is wont to dispense.

The term *leges* applies to all laws in general, but more especially to ecclesiastical laws, permissive as well as penal, nullifying and disqualifying, the latter two being mentioned explicitly. A *lex irritans* is that of can. 185, can. 968, § 1, and every diriment impediment. *Inhabilitantes* are those mentioned, for instance, under canons 504, 2291, n. 9; 2298, n. 5.

A *doubt, i. e.,* a state of mind caused by equally strong reasons which render the choice difficult, may concern the *law* itself, viz., whether the law exists or whether a particular case is included in it, for instance, can. 1070; the doubt may concern a *fact, e. g.,* can. 2350, whether abortion or suicide was committed. In doubts of fact the Roman practice should guide Ordinaries in granting dispensations.

CAN. 16

§ 1. Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expressse dicatur.

§ 2. Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum alienum no-

torium generatim non praesumitur; circa factum alienum non notorium praesumitur, donec contrarium probetur.

§ 1. Ignorance of nullifying laws does not excuse from their observance, unless the contrary is expressly stated.

§ 2. Ignorance or error concerning a law or a penalty or a fact which touches one's own person, or a notorious fact which touches another, as a general rule is not to be presumed; if, however, there is question of a fact regarding another, which is not notorious, ignorance or error may be presumed until the contrary has been established.

This canon does honor to the juridical sense of the law-framers against a certain tendency of minimizing the effect of laws. A well known instance is that of the impediment of crime, which some authors wished to cover with the cloak of ignorance.

In regard to § 2 several observations are to be made:

a) *Ignorance* is the lack of necessary knowledge, whereas *error* is a state of mind approving falsehood for truth. The former is negative, the latter positive and hence more obnoxious, but perhaps also less imputable.

b) A *notorious* fact is one which is publicly known and committed under circumstances that cannot be excused by any artifice (tergiversation) or aid of law (cf. can. 2197).

c) *Presumption* is anticipating a judgment, or forming a judgment from probable arguments and conjectures. Hence our Code defines presumption (a means of defence, but may here serve as a definition in law) as "a

probable conjecture of a thing otherwise uncertain" (can. 1825). For "that which comes nearest to the proof of the fact is the proof of such circumstances as either necessarily or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved." [3] This is of particular service in matrimonial cases as also in the removal of pastors.

Who are *subject to the laws* of the Church?

CAN. 12

Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud iure expresse caveatur.

Not bound by merely ecclesiastical laws are those who have not received Baptism, those who, though baptized, have not a sufficient use of reason, and those who, although they have attained the use of reason, have not yet completed their seventh year, unless the law expressly provides otherwise.

We shall deal with this canon *infra,* where we come to discuss the question who are subject to ecclesiastical laws.

The Code by mentioning "*merely ecclesiastical laws,*" intends to distinguish them from natural and divine (positive) laws as well as from those which, though

3 Cf. Blackstone-Cooley, Commentary, 1879, II, 371. It may be noticed that can. 1825 speaks of *praesumptio iuris* and *praesumptio hominis,* and of the former as *p. iuris simpliciter* and *p. juris et de jure;* here, however, presumption is taken in general, as referring to law.

formulated or more closely determined by human authority, are reductively called divine laws, *e. g.,* the threefold division of the clergy into bishops, priests, and ministers.[4] As examples of merely ecclesiastical laws we may mention irregularities, clearly determined penalties, etc., also the law of fasting and abstinence on certain days.[5]

The question may arise here, whether *baptized non-Catholics* are bound by merely ecclesiastical laws. As far as we can see the Code contains no explicit provision either pro or con, and hence the solution must be sought in the authorities on the old law. These generally agree that, *per se,* baptized non-Catholics are not exempt from the observance of ecclesiastical laws, because by Baptism a man becomes a member of the Church, although there may be, here and now, an obstacle preventing him from being an actual member.[6] The Church is not in a position to enforce these laws, but the right to do so is still radically inherent in the society established by Christ. If there should be a doubt as to the fact or validity of Baptism, the principle, *"in dubio favendum est libertati,"* may be applied. How careless Protestant sects, especially in large cities, are in regard to Baptism, is well known.

Can. 13

§ 1. Legibus generalibus tenentur ubique terrarum omnes pro quibus latae sunt.

§ 2. Legibus conditis pro peculiari territorio ii subiiciuntur pro quibus latae sunt quique ibidem domi-

4 Can. 108, § 3 says *"ex divina institutione,"* and truly so, but the terminology was not settled until the beginning of the 2d century. Cfr. Bruders-Villa, *La Costituzione della Chiesa,* 1903, *passim.*

5 Lent is an ecclesiastical law, but to fast is a divine command. (Matth. IX, 15.)

6 Cfr. can. 87; Suarez, *De Leg.,* IV, 7, 2. A consequence is that Catholics should not offer flesh meat to Protestant servants on days of abstinence.

cilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 14.

§ 1. General laws bind all for whom they are given, everywhere.

§ 2. Laws given for a particular territory bind only those for whom they are given and who have a domicile or quasi-domicile in that territory and actually reside therein, except as noted in Can. 14.

A general law (which term here appears to mean universal law) is one given for the entire Church and all its members, as, *e. g.*, yearly confession, hearing Mass, etc.

Particular laws are limited to the territory for which they are given, for instance, the law governing the election of bishops in the U. S., or laws made by provincial councils and diocesan synods. Particular laws suppose residence in the territory for which they are made,—residence conditioned by domicile, which the present canon limits to *domicile proper* and quasi-domicile. Domicile proper, according to the Roman law,[7] which has been adopted in this matter by canonists, is a fixed habitation in a certain place (municipality, parish) with the intention of staying there always. Hence actual residence, as manifested by the purchase or leasing of a house for an indefinite time, and the intention to remain in that place permanently, are signs of a true domicile. Now-a-days such fixed habitation is rare in large cities,

7 Cf. l. 7, *Cod. Iust.*, X, 10 de incolis: "habere domicilium non ambigitur, ubi quis larem (house-gods) rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur; quodsi rediit, peregrinari jam destitit."

though frequent enough in farming districts. It is therefore entirely reasonable that a *quasi-domicile* should be admitted as meeting the requirements and order of law. This is established by actual residence in a certain parish or municipality with the intention of remaining there for the greater part of the year. This intention must be judged according to can. 92, which requires either intention or actual stay (*commoratio.*) The distinction therefore between domicile and quasi-domicile consists in a difference of intention (*animus*), domicile requiring a perpetual, or at least an indefinitely protracted sojourn, whilst quasi-domicile may be established by a residence of six months. This quasi-domicile is acquired from the first day of residence if the person concerned can be proved to have had the intention of remaining there for the time stated.

This canon does not consider the monthly stay (can. 1097) peculiar to the matrimonial celebration.

The expression: "*For whom they are given*" (can. 13, § 1) calls for special attention. Laws given for laymen do not invariably apply to the clergy, and *vice versa.* Neither do all the laws intended for the secular clergy *eo ipso* bind the regular clergy; nor are the penal laws intended for the clergy meant for bishops and cardinals.[8]

Some peculiarities are attached, by reason of laws being *per se* territorial, to foreigners (*peregrini*), *i. e.*, such persons as have for the moment relinquished their domicile or quasi-domicile, although they retain it (can. 91). Of these can. 14 treats as follows:

Can. 14

§ 1. Peregrini:

1.° Non adstringuntur legibus particularibus sui territorii quandiu ab eo absunt, nisi aut earum trans-

8 See can. 2227, § 2.

gressio in proprio territorio noceat, aut leges sint personales;

2.° Neque legibus territorii in quo versantur, iis exceptis quae ordini publico consulunt, vel actuum sollemnia determinant;

3.° At legibus generalibus tenentur, etiamsi hae suo in territorio non vigeant, minime vero si in loco in quo versantur non obligent.

§ 2. Vagi obligantur legibus tam generalibus quam particularibus quae vigent in loco in quo versantur.

§ 1. Strangers:

1.° Are not obliged to observe the particular laws of their own territory while they are absent therefrom, unless non-observance of these laws should prove detrimental in their own territory, or unless the laws are personal.

2.° Neither are they bound to observe the particular laws of the territory in which they are sojourning, with the exception of those that concern the public welfare or legal formalities.

3.° General laws they must observe, even though these laws are not enforced in their home territory; they are not bound to observe general laws if these laws are not binding in the place where they sojourn.

There is little to be said concerning the first clause. Some examples may illustrate the case. There is, *e. g.*, the law binding every Catholic to support his pastor. If one is absent when the pew-rent is due, he is not, on account of his absence, free from the obligation of paying

the same, because such an excuse would be detrimental to discipline. A bishop's obligation of applying Mass at stated times is incumbent on him even during his absence from the diocese, because it is personal.

The second clause concerns the particular laws of the territory in which one sojourns and provides that whatever is connected with the public welfare or concerns legal formalities, must be observed by strangers (*peregrini*).

The Code does not mention *scandal,* although canonists give that as a reason for the obligation of observing particular laws. The omission is probably due to the fact that scandal may negatively be reduced to considerations of public welfare. An instance may be taken from a particular diocesan statute concerning the frequenting of dramshops, which in some dioceses is forbidden under suspension, whilst in other dioceses no such sanction is attached.

Formalities (*sollemnia*) are outward details which must be observed in order to make an act legal. These are partly civil, *e. g.,* in contracts and last wills, and partly pertain to proceedings in the episcopal court.

The last clause, No. 3, touches upon general laws. An example may be furnished by the ten general holydays of obligation (can. 1247), of which only six are observed in the United States. An American travelling in countries where the ten holydays are kept, must observe them. A European, on the other hand, sojourning in this country, may conform himself to our custom.[9]

Section two added to our cannon concerns the *vagi, i. e.,* such as possess neither domicile nor quasi-domicile. They are obliged to observe both the general and the particular laws in effect at the place where they are staying. This regulation is somewhat stricter than usually ac-

9 A stricter view is taken by Suarez, *De Leg.* III, cc. 32 f.

cepted by commentators. Yet it is in keeping with the civil law and is really nothing else but the consistent application of the *forum competens*.[10]

INTERPRETATION OF LAWS

By interpretation we mean an explanation of the will of the legislator taken from the wording of the text. As the Roman emperors issued interpretations of obscure texts,[11] so did the popes, first and above all in matters of faith, but also, especially after authentic collections had been published, in disciplinary matters. The Council of Trent decreed that authentic interpretations should be given by the authority from which the law emanated. The S. C. Council was especially charged with interpreting the Tridentine decrees. Besides as the jurisconsults, too, rendered decisions or explanations, so did the canonists proffer their explanations, which at times were sought for, or at least accepted, by the Roman Court.

Thus we have a twofold interpretation, authentic and private. An *authentic* interpretation[12] proceeds from the maker of the law.

(For canons 15 and 16, see *supra*, pp. 85 sq.)

CAN. 17

§ 1. Leges authenticae interpretatur legislator eiusve successor et is cui potestas interpretandi fuerit ab eisdem commissa.

§ 2. Interpretatio authentica, per modum legis exhibita, eandem vim habet ac lex ipsa; et si verba legis in se certa declaret tantum, promulgatione non eget et valet retrorsum; si legem coarctet vel extendat aut

10 Cfr. c. 20, X, II, 2 de foro compet. and the commentators on the same, for instance, Reiffenstuel, II, 2, n. 44 f.; Engel, h. t., n. 11.

11 Blackstone-Cooley, *l. c.*, I, p. 58.

12 *Authentic* from the Greek *αὐθέντης*, means self-authorized, original, authoritative.

dubiam explicet, non retrotrahitur et debet promulgari.

§ 3. Data autem per modum sententiae iudicialis aut rescripti in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est.

§ 1. Laws are authentically interpreted by the legislator or his successor, or by those to whom the power of interpretation has been given by either the legislator or his successor.

§ 2. An authentic interpretation, given in the form of a law, has the same force as the law itself; if it is merely a declaratory interpretation, it needs no promulgation and its obligatory force goes back to the day when the law itself was promulgated; but if the interpretation is restrictive or extensive or settles a doubt, it is not retroactive and requires to be promulgated.

§ 3. If an interpretation is given in the form of a legal judgment, or of a rescript in a special case, it has not the force of law, but binds only those persons and affects only those matters for whom or for which it is given.

As an authentic interpretation can be given only by the lawgiver or his successor and by those to whom the power of interpretation is committed by the lawgivers, the Pope and the Roman Curia (congregations, tribunals, offices) are the authentic interpreters of all those laws which proceed from the Sovereign Pontiff, whilst the Bishops or their successors are the interpreters of their own laws.

The interpreter may be in a position where he has either to extend the law or restrict it. He *extends* by

interpretation if he applies the wording or text to cases or persons not mentioned in the law or not included in the original intention of the lawgiver, although the extension is not against the lawgiver's will;[13] for instance, exemption or papal enclosure to religious without solemn vows.[14]

A *restrictive* interpretation takes place when the law is limited to fewer persons or cases than the wording and the mind of the legislator would seem to indicate,[15] *e. g.,* if the people are interdicted but the clergy is not included. Besides doubts may arise, *e. g.* in rubrics, which must be solved. And, lastly, there may be required a merely *comprehensive* (declaratory) explanation, *viz.,* one which explains the law literally, but in more obvious terms, by substituting other words.

The Code (can. 17, § 2) says that an *authentic* interpretation of a law is of equal force with the law itself and has the same binding power; and if it be a merely declaratory interpretation, it needs no promulgation and its obligatory force goes back to the date of the promulgation of the law itself. An interpretation that is extensive or corrective (restrictive), on the other hand, must be promulgated and is not retroactive.

There is, however, another authentic interpretation possible, *viz.,* one demanded by parties directly interested. It may happen, for instance, that a matrimonial case, or a case of precedence, must be decided by way of interpretation. This is done by a so-called *judiciary interpretation,* rendered by a legitimate judge (can. 17, § 3). Evidently such an interpretation binds only the parties

13 Cfr. c. 3, 6°, III, 14.

14 Suarez, *l. c.,* VI, cc. 2 f.; Reiffenstuel, I, 2, n. 370 f.

15 Saurez, *l. c.,* VI, 5, 1: "Omnis restrictio legis eo tendit, ut mentem ipsam legislatoris ad pauciora coarctet, quam verba vel ratio legis prae se ferre videntur."

concerned and in the matter decided, and outsiders are not affected thereby.

Private interpretation, *viz.*, one given by jurisconsults not commissioned by the lawgiver, or by expert canonists (doctors), must be made in conformity with certain rules which are necessary for the right understanding of ecclesiastical — in fact of all — law. These rules are, of course, generally obeyed also by the authentic interpreters, but they are of importance especially in private interpretation and for those who wish to read and study Canon Law rightly. These rules are briefly the following:

CAN. 18

Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum.

Ecclesiastical laws must be understood according to the proper meaning of the words considered in their context; if the meaning remains doubtful and obscure, recourse must be had to parallel texts in the Code, if there are any, to the purpose of the law and the circumstances surrounding it, and to the mind of the lawgiver.

Ecclesiastical laws must be interpreted in the light of their wording, as borne out by the context. Hither belong various rules culled from the Roman and the Canon Law: "Ubi verba non sunt ambigua, non est locus interpretationi;" [16] "Verba sunt intelligenda secundum

[16] L. 25, Dig. 32 delegatis et fidei-com. (ed. Mommsen, 1902, p. 445).

propriam significationem," *i. e.,* in their usual and common signification;[17] "Verba generalia generaliter sunt sumenda," and "Ubi lex non distinguit, neque nos distinguere debemus."[18]

The *context,* too, must be considered, for it may be useful to compare words or sentences in the order and connection which they have with one another.

When the terms are *doubtful* and obscure, the interpreter must have recourse to parallel texts of the Code, and study the purpose and circumstances of the law and the mind of the legistator. Parallel texts are such as have an affinity with the subject or are expressly related to the same. Here the rule holds good: "De similibus idem est judicium."[19] Note, however, that the similarity must bear on the point at issue.

The purpose or *end* of the law must be regarded in such a way that the interpretation really effects the scope, hence the rule: "Certum est, quod is committit in legem, qui legis verba complectens, contra legis nititur voluntatem." The scope is sometimes, especially in long decrees, premised in the preamble, which may then serve as a guide to the interpreter.

The *circumstances* surrounding a law are either *historical, i. e.,* facts which prompted the law, *e. g.,* the removal of a parish priest, or *real, i. e.,* actual needs and reasons of time and person.

The *mind of the legislator* must, of course, first and above all be deduced from the words of the law. Circumstances, context, subject, etc., also help to disclose the mind of the legislator, as well as the *ratio legis,* which is called the soul of the law. Hence the rule,

17 Reiffenstuel, I, 2, 390 ff.; Blackstone-Cooley, *l. c.,* I, p. 59.

18 Cf. Summarium ad l. 8, *Dig.,* 6, 2 de Publiciana.

19 Cfr. can. 701 with can. 106; c. 2, X, I, 7; c. 3, X, I, 2.

"Non debet intentio verbis deservire, sed verba intentioni." [20]

But we must guard against the assumption that the intention of the interpreter may be carried into the text. Hence if all the means so far enumerated fail in discovering the true mind of the legislator, nothing is left but to make direct inquiry by petitioning the competent authority. Therefore we sometimes read: "Iuxta mentem," and the "mens" is set forth explicitly; but sometimes it must be guessed at, as said before.

Can. 19

Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi.

All penal laws as well as those which restrict the free exercise of rights or embody an exception to the law, are subject to strict interpretation.

The first clause of this canon is contained in the well known rule XV in Sexto: "Odia restringi, favores convenit ampliari," and rule 49, I. C.: "In poenis benignior interpretatio est facienda." Such an interpretation is neither extensive nor restrictive, but merely comprehensive; but an explanation which simply negatives the penalty is no interpretation. Strict interpretation clings to the text, and pays due regard to the mind of the legislator, but mitigates the rigor of the law as far as the *ratio legis* will permit. What is meant by restricting the free exercise of rights is best understood by the example of the Ordinary exercising his rights as diocesan in appointments, etc.

Exceptions from laws may be either privileges or fa-

[20] Cfr. c. 11, C. 22, q. 5.

vors of a personal nature, or particular or special laws, which latter are called *exorbitantes*,[21] *i. e.*, running beyond the sphere of general or common law. For instance, a private oratory is a favor, exemption is a special law, and all these are subject to strict interpretation.

CAN. 20

Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, a legibus latis in similibus; a generalibus iuris principiis cum aequitate canonica servatis; a stylo et praxi Curiae Romanae; a communi constantique sententia doctorum.

If a general or a particular law contains no definite prescription concerning a case, unless there is question of applying a penalty, the rule for deciding such a case must be taken from laws given in similar cases, from the general principles of Canon Law based on equity, from the method and practice of the Roman Court, or from the common and constant teaching of approved canonists.

It is evident that a lawgiver cannot foresee or anticipate all the cases that may arise in practice in connection with his law. Hence something is always left to private judgment. Now there are four sources from which private judgment may draw aid in solving exceptional cases. They are:

1. The "usus forensis" or "auctoritas rerum similiter iudicatarum." This is nothing else but the norm of customary procedure and decisions previously rendered in

21 Cf. c. 11, C. 22, q. 5.

cases similar to the one in dispute. Although such decisions, especially if they have emanated from the Roman tribunals, must be received respectfully, and may be followed securely, yet their force does not extend so far as not to admit of a contrary verdict if the reasons are strong enough to upset former decisions.[22]

2. The second means of deciding cases is recourse to general legal principles based on the equity of Canon Law. That *equity* is a means of practical interpretation and application is evident, for reason dictates that, if a law is deficient in a particular case, it should be applied according to the principles of law, indeed, but with a human feeling.[23]

The principles, of course, must be taken from Canon, not from civil law. The Code indeed recognizes civil laws as binding, but only as far as they are not opposed to the divine law and not contrary to the explicit rulings of the Code (see can. 1508 f.; 1529). It also admits of equality with regard to the so-called *res mixtæ* (can. 1553, § 2). Furthermore, there are two canons which apparently "canonize" the respective civil laws, *viz.*: 1059 and 1080, concerning adoption as a marriage impediment. Yet even these laws hardly constitute a source proper of Church law; they remain civil laws, though expressly acknowledged by the Church.

3. The third means of applying the law is by rendering a decision in default of an existing law in accordance with the *stylus curiae*. From remote antiquity, as the "Liber Diurnus" [24] shows, the Roman Court or Apostolic Chancery employed a uniform, nay almost stereotyped mode of expediting affairs. This "stable method

22 Boekhn, *Comment. in Jus Universum*, 1735, I, 4, n. 39.

23 L. 8, *Cod. Iust.*, III, 1: "Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem;"— but this feeling must not be indulged too far, lest it destroy all law. Blackstone-Cooley, *l. c.*, I, p. 61.

24 Ed. Th. Sickel, 1889.

of proceeding in ecclesiastical causes and dispatching apostolic documents" is called the style of the Roman Curia. It partakes of the nature of a law for the different tribunals and the parties engaged in litigation before them.[25]

4. The last mode of propounding or expounding a case is the *authority of the school.* That the professional canonists have exerted a decided influence since the time of Gratian, not only upon decisions but on lawmaking itself, is well known. The "school" itself distinguished a threefold class of opinions: *communissima,* when all authors agreed; *communis,* when several weighty authors held the same opinion; *controversa,* when there was disagreement among canonists.[26] And it was always regarded as rash to deviate from the *opinio communissima.* The Code mentions the "common and constant opinion" of the school as a guiding principle in deciding a doubtful case, and justly so because such a consensus is sufficient for moral certainty. For the rest, even the *opinio communissima* does not constitute law.

Applying these rules, and especially that of equity, one may persuade himself that a certain law does not apply to himself under given circumstances. This may be true. However, since the law is intended for the common welfare, it is necessary to consider the rule laid down in canon 21.

Can. 21

Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit.

Laws given in order to guard against a common

25 Riganti, *Comment. in Reg. Canc. Ap.,* 45, § 1, n. 96.

26 Schulte, *Quellen,* 1860, I, p. 258.

danger must be observed even if that danger in a particular case is absent.

The term "*generale*" here has reference to the community or body of the faithful, because a term extends to the species contained in the genus.[27] However, the term may also be taken as comprising a certain class of members, *e. g.*, the clergy, or the laity. Thus the law of reading forbidden books binds all, the law of guarding the *privilegium fori,* the clergy only, etc.

CESSATION OF LAWS

CAN. 22

Lex posterior, a competenti auctoritate lata, abrogat priori, si id expresse edicat, aut sit illi directe contraria, aut totam de integro ordinet legis prioris materiam; sed firmo praescripto can. 6, n. 1, lex generalis nullatenus derogat locorum specialium et personarum singularium statutis, nisi aliud in ipsa expresse caveatur.

A later law, given by competent authority, abrogates an earlier one if it expressly says so, or if it is directly contrary to it, or re-orders the subject-matter of the older law; however, Can. 6, No. 1 of this Code remains in full force, that is to say, a general law in no wise derogates from the laws in force in particular places or with regard to particular persons, unless the contrary is expressly provided therein.

27 Cf. Barbosa, *Tractatus Varii,* Axioma 106: "Generalis dispositio omnes species comprehendit." Suarez, *De Leg.,* III, c. 30. This is, of course, more urgent when there is necessity of professing the faith or maintaining its unity or obeying superiors.

In other words, an existing law loses its force if a new law is made by which it is abolished. This may be done (a) by an act of explicit abrogation, or (b) in virtue of the prescriptions of the new law being directly opposed to that of the old, or (c) if the new law reorders the entire subject-matter of the old.

a) Papal constitutions sometimes contain the clause, "hac immutabili et in perpetuum valitura constitutione." This is merely an emphatic assertion that the law should not be recalled without reason; it does not bind the Pope's successor, because "par in parem non habet imperium." [28] If the successor expressly mentions his predecessor's law as abolished, the latter loses its force.

b) A later lawgiver may issue a law about a matter (*e. g.* matrimonial) which runs contrary to former laws; hence the rule, "Lex posterior generalis derogat legi priori generali."

c) A thorough overhauling of the subject-matter has the same effect, for instance, in the removal of parish priests.

However, a general law does not abrogate a particular or special law unless the intention of the lawgiver is clearly expressed to that effect in a special clause. Such a clause would be, "non obstantibus quibuscunque etiam speciali vel specialissima mentione dignis." [29] In the canon quoted the Code ordains that all particular and special laws remain in force unless the contrary is expressly stated. Thus, *e. g.*, the particular law on episcopal nominations in the U. S. remains in force even under the new Code.

CAN. 23

In dubio revocatio legis praeexsistentis non prae-

28 Cfr. c. 20, X, I, 6 de elect.

29 Cfr. the Constitution of Benedict XV prefixed to the Code, *supra*, pp. 64 sqq.

sumitur, sed leges posteriores ad priores trahendae sunt et his, quantum fieri possit, conciliandae.

Where there is doubt whether or not a law has been revoked, [by the Code or by another general law], it may not be presumed that the law has been revoked, but the old law should be compared with the new, and both made to harmonize, as far as possible.

This canon expresses the law of continuity in the legislation of the Church. It would be unwarranted to assume — as has, strangely enough, been done — that the new Code came into being like a *Deus ex machina* and that an insurmountable wall is now erected between the *Corpus Juris Canonici* (in a wider sense) and the Code. The sources (*fontes*) quoted will show the continuity of legislation.

CAN. 24

Praecepta, singulis data, eos quibus dantur, ubique urgent, sed iudicialiter urgeri nequeunt et cessant resoluto iure praecipientis, nisi per legitimum documentum aut coram duobus testibus imposita fuerint.

Precepts given to individuals oblige those for whom they are given, everywhere, but they cannot be juridically enforced, and cease to bind when the lawgiver loses his authority, unless indeed they were imposed by a legal document or in the presence of two witnesses.

A precept (command, injunction), therefore, differs from a law, in as far as it "cleaves to the person to

whom it is given" (*ossibus inhaeret*) and ceases with the authority or office of the one who gave it. Hence if an Ordinary has given a precept [30] to a clergyman, that precept does not bind after the death or resignation of the Ordinary, unless the precept was given peremptorily by way of an official document (not merely a paternal letter) or in the presence of two witnesses (examiners).

30 Cfr. for inst. can. 2177, against *concubinarii*.

TITLE II

CUSTOM [1]

Logically the Code now proceeds to deal with that other source of legal obligation known as Custom. Custom (*consuetudo*) generally speaking is a "law introduced by uniform and constant usage of the people with the consent of the legitimate power." Two elements, therefore, constitute the essence of a customary law: a *material* one, which consists of a certain number of repeated acts, and a *formal* one, which is the consent of the legislator. Canon 25 asserts that an ecclesiastical custom obtains its obligatory force solely from the consent of ecclesiastical authority.

Can. 25

Consuetudo in Ecclesia vim legis a consensu competentis Superioris ecclesiastici unice obtinet.

An ecclesiastical custom derives legal force solely from the consent of the ecclesiastical superior.

The word *unice* in the text clearly refers to *consent.*

The Code wisely abstains from determining the nature of the consent required.

Consent may be *express, i. e.,* given by words or conclusive signs explicitly approving a custom; or *tacit,*

[1] Cfr. title IV of the Decretals and the commentators thereon.

given by the fact that the lawgiver, though aware of the custom and in a condition to oppose it, does not contradict; or finally, *legal,* which is nothing else but the will of the legislator supposedly permitting a custom. The majority of canonists teach that *legal consent* suffices for introducing a custom.[2] The fact that customs have been introduced which the sovereign Pontiffs at first ignored[3] and afterwards accepted, seems abundant proof for that opinion.

That legal consent is *required* for the validity of a custom follows from the nature of the latter as a law; a law must proceed from legitimate authority.

As to the material element or *repeated acts,* these must bear the character of usage, and hence be frequent, public, and uniform. *Frequency* supposes more than one act, at least in common parlance. They must be *public* because they supply the formal act of promulgation; and *uniform* in order to demonstrate the conviction of the people.[4] This latter quality (uniformity) calls for another requisite, *viz., voluntariness.* The acts constituting a custom must be voluntary, for the people, in order to create or show the *persuasio juris,* must be free of intrinsic and extrinsic coercion,— in other words, they must not be under the impression as if they were bound to observe the custom in question because they falsely believe it to be a law.[5] Hence the intention of obliging themselves is necessarily included in the formation by the people of a custom.

One may ask, how can any one oblige himself to com-

2 Cfr. Reiffenstuel, I, 4, n. 136 ff.

3 Cfr. c. 2, 6°, I, 2: "Quia tamen locorum specialium et personarum singularium consuetudines potest probabiliter ignorare."

4 Cfr. c. 5, X, V, 41; Bockhn, *l. c.,* I. 4, nn. 31 ff.; Zallinger, *Iustit. Iuris Eccl.,* l. I, tit. 4, § 228 f.

5 Cfr. the glossa on c. 11, h. t.; v. Scherer, *l. c.,* I, p. 132.

mit a sin? This objection supposes the distinction between *a custom against the law* and *a custom beyond the law.*

A *custom against* the *law* (*contra legem*) does not create law, but merely removes the obligation of observing a law contrary to custom, whilst a custom *beyond* or *besides the law* constitutes a law in defect of a law (*deficiente lege inducit obligationem legis*). The latter alone is a custom properly speaking.[6] The objection stated supposes *mala fides* in those who commence a custom contrary to a law which they are supposed to know. We do not deny that those who first act against the law may be *in mala fide;* for they may act with a doubtful conscience, which is not permitted except under certain well-defined circumstances. However, we fairly deny that *mala fides* is always the first cause of acting against a law. There may be a thorough conviction that a law is no longer useful or adapted to circumstances, and hence had better be disregarded. Besides, it must be maintained that the people directly and reflexly have the will only of freeing themselves from a burden or restriction opposed to liberty, which reflexive will cannot be said to be evil in itself. Therefore *mala fides* must not necessarily be supposed; and even if it were present in the beginning, it may disappear afterwards. At any rate, a custom against a law may arise[7] either with or without *mala fides.* The next query may be: what is understood by *people,* for so far we have only spoken of the people in general. Canon 26 answers that question.

6 A custom according to law (*iuxta legem*) is strictly no custom at all, but simply a vivid expression and interpretation of an existing law; hence can. 29 says: "*consuetudo optima legum interpres,*" which needs no comment.

7 Cf. Reiffenstuel, I, 4, nn. 142 ff.; Boekhn, I, 4, nn. 19 ff.; Wernz, *Ius Decretalium,* ed. 1, I, 255.

CAN. 26

Communitas quae legis ecclesiasticae saltem recipiendae capax est, potest consuetudinem inducere quae vim legis obtineat.

A community which is capable of having an ecclesiastical law imposed on it, can introduce a custom which may obtain the force of law.

Law and custom suppose a certain amount of autonomy. This is verified in corporations acknowledged as such by the Church — for we are concerned with ecclesiastical law — and hence: (a) the Church at large, (b) ecclesiastical provinces and dioceses, and (c) ecclesiastical corporations specially designed as such, for instance, religious orders, also single exempt monasteries (*e. g.*, of Benedictines), cathedral chapters, and congregations which enjoy exemption. Congregations of religious with simple vows, or rather, let us say, diocesan institutes, are incapable of introducing a custom, primarily so-called, because they lack autonomy in the proper sense. For the same reason ecclesiastical parishes cannot form a custom, although both parishes and diocesan institutes may have observances.[8]

Two other elements essential to custom are contained in canons 27 and 28.

CAN. 27

§ 1. Iuri divino sive naturali sive positivo nulla consuetudo potest aliquatenus derogare; sed neque iuri ecclesiastico praeiudicium affert, nisi fuerit rationabilis et legitime per annos quadraginta continuos et comple-

8 Reiffenstuel, *l. c.*, nn. 110 ff.

tos praescripta; contra legem vero ecclesiasticam quae clausulam contineat futuras consuetudines prohibentem, sola praescribere potest rationabilis consuetudo centenaria aut immemorabilis.

§ 2. Consuetudo quae in iure expresse reprobatur, non est rationabilis.

§ 1. No custom can in any wise derogate from a divine law, be it natural or positive; nor does any custom prejudice an ecclesiastical law, unless it is a reasonable custom and has obtained for forty continuous and full years; the only custom that can obtain against an ecclesiastical law containing a clause prohibiting future customs, is a reasonable custom that has existed for a century or from time immemorial.

§ 2. No custom is reasonable which is expressly reprobated by law.

If custom is a law which is essentially reasonable, the custom itself must be reasonable. Consequently no unreasonable custom is admissible. Canonists have laid down certain marks or notes by which a custom is shown to be unreasonable. A custom is unreasonable,

a) If it is contrary to natural and divine law or if it runs counter to faith and morals;[9]

b) If it is repugnant to the constitution of the Church, *e. g.*, if laymen would usurp ecclesiastical power,[10] if a council would set itself above the pope, if a priest would claim episcopal power, if the liberty of the Church were

[9] Cc. 4, 8, 11, Dist. 12; cc. 8, 9, X, V, 3 de simonia.

[10] C. 14, X, I, 6 de elect.

curtailed, or the free communication between pastor and faithful disturbed, etc.

c) If it is subversive of ecclesiastical discipline, for instance, contempt of censures,[11] multiplicity of benefices in the same hand,[12] and for religious communities if they should elect a superior from a different order.[13]

d) If a custom is reprobated by law.[14]

The other element is *prescription*,[15] which here means the time during which a custom has prevailed. Prescription, according to the Code, requires forty continuous and complete years. By this decision the Code has cut a Gordian knot and stopped much unnecessary waste of paper. The Code has gone even farther by demanding a centennial or immemorial prescription in cases where a custom is directed *against* an ecclesiastical law which contains a clause prohibiting future customs. For a custom *beyond* the law forty full years' prescription is also required.

Can. 28

Consuetudo praeter legem, quae scienter a communitate cum animo se obligandi servata sit, legem inducit, si pariter fuerit rationabilis et legitime per annos quadraginta continuos et completos praescripta.

A custom beyond the law, which has been knowingly observed by a community with the intention of binding itself, becomes a law if it is

11 C. 5, X, I, 4: "insordescere in censuris."

12 C. 1, 6°, I, 4.

13 C. 1, Clem. I, 3.

14 Our Code employs the term "reprobata consuetudine" quite frequently.

15 Canonists of note reject prescription as a requisite for custom, but erroneously; cfr. Schulte, *Quellen*, I, p. 223 ff.; v. Scherer, I, 133.

reasonable and has been legitimately observed for forty full and continuous years.

Here we must revert to canon 5 (*supra,* p. 76) among the general norms, for it is directly connected with the present subject. This canon ordains, as we have seen, that all customs, either universal or particular, although immemorial, which are contrary to the canons here embodied and are expressly condemned as corruptions, must be set right nor be allowed to revive. Other customs, if centennial and immemorial, may be tolerated when the Ordinaries deem, according to circumstances of time and persons, that they cannot be abolished, while all other customs must be regarded as suppressed unless the Code provides otherwise. This canon states the relation of the customs in use at the time of the Code's going in force, *i. e.,* the 19th of May, 1918, to the canons of the new Code, but it also touches future customs. Customs which are expressly reprobated in the new Code (cfr. can. 818 etc.) must be abolished because the Church regards them as corruptions. The future is considered as far as it is incumbent upon Sion's watchmen to guard against revival.

The second clause of Canon 5 treats of customs which are *per se* reasonable but not in keeping with the new Code. Such customs, if centennial and immemorial, may be tolerated. There seems to be a difference between a centennial and an immemorial custom, because the former term denotes a precise duration, whereas the latter implies no more than a span of time that is beyond the memory of a fairly old person; for instance, two generations may suffice to accept an immemorial custom.[16]

16 All commentators agree that "consuetudo immemorialis seu inveterata sit illa cuius initii non extat memoria." Cfr. c. 26, X, V, 40,

But canon 5 employs the conjunctive particle "*et*" (and), while canon 27, § 1, when speaking of prescription, employs the disjunctive particle "*aut*" (or). The difference lies in the introduction and abolition of customs, inasmuch as a legislator seems more ready to connive at the use of customs than at their opposition to a newly published code,— which position is entirely intelligible. However, all customs which are not of the venerable age indicated, should be suppressed, although common sense must even here have its sway; for common sense is based upon the dictates of reason and goes a long way.

CAN. 29

Consuetudo est optima legum interpres.

Custom is the best interpreter of laws.

This canon needs no further explanation in view of what we have said above.

ABOLITION OF CUSTOMS

CAN. 30

Firmo praescripto can. 5, consuetudo contra legem vel praeter legem per contrariam consuetudinem aut legem revocatur; sed, nisi expressam de iisdem mentionem fecerit, lex non revocat consuetudines centenarias aut immemorabiles, nec lex generalis consuetudines particulares.

Can. 5 remaining in full force, a custom either against or beyond the law may be revoked by a

to which the Gloss adds: "diligenter notandum quod consuetudo illa ius sive privilegium inducit."

contrary custom or law; however, a law, unless it makes express mention thereof, does not abolish centenary or immemorial customs, nor does a general law abolish particular customs.

That a contrary custom may make another custom ineffective, is evident; for custom is law, and therefore, as a law is revoked by a contrary law, so also a custom may be revoked by a contrary custom. Only we must notice that the contrary custom must fully cover the old custom and be vested with the requisites set forth above. As to the effect which a *contrary law* exerts upon a custom, the canon says that it does not revoke a custom unless it contains an express clause to that effect. Such *clauses* are: "*nulla obstante consuetudine,*" and "*nulla obstante consuetudine etiam immemoriali.*" The first clause revokes any general (not particular) custom less than centennial or immemorial; the second abolishes also immemorial customs. If the lawgiver wishes to do away with some particular custom, he adds the clause "*non obstante consuetudine etiam particulari*" or some similar expression. A custom expressly called "*reprobata*" is abolished even by the first-quoted simple clause.[17]

One last question: *Can a custom arise against the new Code itself?* The same query was made concerning customs arising against the decrees of the Council of Trent. Hence we answer with the majority of canonists:[18] A custom branded as reprobate, being unreasonable, cannot be admitted at all or only with greatest difficulty, but other customs may arise also against the new Code. For the resp. *clausulae* are nothing but disciplinary laws, and disciplinary laws admit of a contrary custom.

17 Cf. Reiffenstuel, I, 4, n. 190. 18 Cfr. Aichner, *l. c.*, § 17, 3.

TITLE III

ON THE RECKONING OF TIME

The present title does not deal with the chronology employed in papal documents, but with the canonical method of calculating time. It may be noted that since the pontificate of Gregory VII (1073–85) the reign of each pontiff commenced with his election, and papal documents were dated according to the year of the Incarnation (25 March) or Christmas Day. Now they are dated according to the calendar year. The indictions (periods of fifteen years) have also disappeared without detriment to chronology. This premised, we will now follow the Code in its determination of the value and duration of the different components of time.

Can. 31

Salvis legibus liturgicis, tempus, nisi aliud expresse caveatur, supputetur ad normam canonum qui sequuntur.

Aside from the liturgical laws, time must be reckoned according to the norms established in the following canons, unless a different method is expressly provided.

The *liturgical norms* which are here excepted from the following rules, concern the liturgical year commencing with the first Sunday of Advent, the celebration of feastdays (*a vespera usque ad vesperam*), as far as the

office is concerned, and the gaining of indulgences. In these matters then, which were noted in the *computus ecclesiasticus,* the Code does not make a change.[1]

Can. 32

§ 1. Dies constat 24 horis continuo supputandis a media nocte, hebdomada 7 diebus.

§ 2. In iure nomine mensis venit spatium 30, anni vero spatium 365 dierum, nisi mensis et annus dicantur sumendi prout sunt in calendario.

§ 1. The day consists of twenty-four hours calculated from midnight; the week of seven days.

§ 2. The law reckons the month as a period of thirty days, the year as a period of 365 days, unless it is expressly declared that month and year are to be taken as they are in the calendar.

This is to be understood in the case only of several months or years being enumerated without any further designation, or in the sense of a period, where a month would equal 30 days, and *vice versa.*

Can. 33

§ 1. In supputandis horis diei standum est communi loci usui; sed in privata Missae celebratione, in privata horarum canonicarum recitatione, in sacra communione recipienda et in ieiunii vel abstinentiae lege servanda, licet alia sit usualis loci supputatio, potest quis sequi

1 Cf. Gavanti, *Thesaurus S. Rituum,* Venet., 1740, II, 17 ff.; Van der Stappen, *Sacra Liturgia,* Mechl., 1898, I, 123 ff. Concerning indulgences S. O. (de indulg.), Jan. 26, 1911.

tempus aut locale sive verum sive medium, aut legale sive regionale sive aliud extraordinarium.

§ 2. Quod attinet ad tempus urgendi contractuum obligationes, servetur, nisi aliter expressa pactione conventum fuerit, praescriptum iuris civilis in territorio vigentis.

§ 1. In reckoning the hours of the day, the common local usage must be followed; but in the private celebration of Mass, in the private recitation of the Breviary, in receiving Holy Communion, and in the observance of fast and abstinence, though the usual computation of time differs, one may follow the local time, true or mean, or the legal time, regional or extraordinary.

§ 2. When there is question of enforcing contractual obligations, the time prescribed by civil law should be followed, unless otherwise expressly agreed upon.

Common usage reckons the day from midnight to midnight. In some countries twice twelve hours are counted, while in others (*e. g.*, Italy) the watch shows twenty-four continuous hours. Some liberty is granted in the private celebration of Mass, the private recitation of the Breviary, receiving Holy Communion and observing the laws of fast and abstinence. In these matters one may follow local or legal custom, although both may differ from common usage. Local custom may have accepted the real or mean solar time, whilst legal custom is that assumed by law and acknowledged in a province or coun-

try. The astronomical calculation of a day would be that of sidereal time, which differs from the mean solar time, the solar day being some three minutes and fifty-five seconds longer than the sidereal day.[2] What is of practical use, however, is to know that in the United States there are five different kinds of time, 15° of longitude corresponding exactly to one hour of time difference. The time of the 60th meridian is called *Colonial,* that of the 75th Meridian, *Eastern,* that of the 90th, *Central,* that of the 105th, *Mountain,* that of the 120th, *Pacific time.*[3] In fulfilling the duties mentioned one may follow either the sun time or the standard time, whether local or legal, *e. g.,* war time. (Cfr. Noldin, *De Sacr.,* 1920, n. 146.)

In matters of *contract* the time assumed by civil law must be followed, unless otherwise agreed upon by the contracting parties. In this country the laws of the different States will, therefore, have to be consulted.[4]

The next canon enters into details which touch more closely upon the *starting and finishing point of a given period,* and a distinction is drawn between juridical and calendar time. It is well known that the English law, for instance, has a double way of counting time. Thus when a deed speaks of a month, it is a lunar month consisting of 28 days, unless the context shows that a calendar month of 31 days was intended. Thus also, according to English law, when a calendar month's notice of action is required, the day on which it is served is included and reckoned one of the days; and therefore, if a notice be served on the 28th of April, it expires on the 27th of May, and the action may be commenced on

2 Cfr. Young, *Manual of Astronomy,* 1902, p. 84 ff.

3 Cfr. the *New International Encycl.,* 1904, Vol. XIX, p. 291.

4 Cfr. Blackstone-Cooley, *l. c.,* II, p. 141 f.

the 28th. The same law, however, in ecclesiastical matters calculates the month according to the calendar or solar reckoning.[5] This premised, let us see what the Code determines:

CAN. 34

§ 1. Si mensis et annus designentur proprio nomine vel aequivalenter, ex. gr., *mense februario, anno proxime futuro,* sumantur prout sunt in calendario.

§ 2. Si terminus *a quo* nec explicite nec implicite assignetur, ex. gr., *suspensio a Missae celebratione per mensem aut duos annos, tres in anno vacationum menses,* etc., tempus supputetur de momento ad momentum; et si tempus sit continuum, ut in allato primo exemplo, menses et anni sumantur prout sunt in calendario; si intermissum, hebdomada intelligatur 7 dierum, mensis 30, annus 365.

§ 3. Si tempus constet uno vel pluribus mensibus aut annis, una vel pluribus hebdomadibus aut tandem pluribus diebus, et terminus *a quo* explicite vel implicite assignetur:

1.° Menses et anni sumantur prout sunt in calendario;

2.° Si terminus *a quo* coincidat cum initio diei, ex. gr., *duo vacationum menses a die 15 augusti,* primus dies ad explendam numerationem computetur et tempus finiatur incipiente ultimo die eiusdem numeri;

3.° Si terminus *a quo* non coincidat cum initio diei, ex. gr., *decimus quartus aetatis annus, annus novitiatus, octiduum a vacatione sedis episcopalis, decendium ad appellandum,* etc., primus dies ne computetur et tempus finiatur expleto ultimo die eiusdem numeri;

4.° Quod si mensis die eiusdem numeri careat, ex.

5 Cfr. Blackstone-Cooley, I, p. 141.

gr., *unus mensis a die 30 Ianuarii,* tunc pro diverso casu tempus finiatur incipiente vel expleto ultimo die mensis;

5.° Si agatur de actibus eiusdem generis statis temporibus renovandis, ex. gr., *triennium ad professionem perpetuam post temporariam, triennium aliudve temporis spatium ad electionem renovandam,* etc., tempus finitur eodem recurrente die quo incepit, sed novus actus per integrum eundem diem poni potest.

On account of the technical character of this canon, we shall add our explanation immediately to each paragraph.

1. If months and years are designated by their names, or in equivalent terms, they must be understood as calendar months and years. Thus the month of February must be taken as comprising 28 days; if an equivalent term is used, as, *e. g.,* "in the next following year," let us say 1920, the leap year is understood, or 366 days, while the uneven years have each but 365 days.

2. If the starting point or *date from which* anything is calculated, is neither *explicitly nor implicitly determined,*[6] the time must be reckoned from moment to moment, thus, *e. g.,* a suspension from the celebration of Mass for a month or two years commences on the day and hour when the letter was received by the suspended priest. The same holds good concerning the other example alleged, *viz.,* three months' vacation a year. The canon further explains the first example thus: if the time or period is *continuous* (as in the case of suspension), the calendar month and year are to be understood; hence

[6] Implicitly, for instance, after Easter Sunday, or next month on the feast of Pentecost; see *Homiletic Monthly,* Nov. 1918, p. 171.

if the letter of suspension arrives at 5 P. M., let us say, on the 5th of October, the suspension lasts until December 5th, 5 P. M. If the time or period is or may be *interrupted,* as in the example of leave of absence, a week means 7 days, a month 30 days, a year 365 days.

3. If the time or period consists of one or more months, or years, or of one or more weeks, or of several days, and the starting point is *explicitly* or *implicitly determined,* various hypotheses may arise.

1°. Months and years are always assumed to be calendar ones.

2°. If the starting point (*terminus a quo*) *coincides* with the beginning of the day, the first is included in reckoning the time, and the time or period expires with the beginning of the last day of the same number, *e. g.,* if a two months' vacation is given, beginning August 15th, the time runs out on the morning of October 15th.

3°. If the starting point *does not coincide* with the beginning of the day, the first day is not counted and the term expires when the last day of the same figure is completed. Thus, if one commences a year's novitiate on the afternoon, say of the 5th of October, 1917, he can make his profession on October 6th, 1918, because the last day is complete only after the last stroke of midnight, October 5th, or as soon as October 6th has commenced.

4°. If the month has no day of the same number, say one month from January 30th, then, duly considering diverse cases, the term expires either with the beginning or ending of the last day. What "due consideration" means is evident from the two foregoing hypotheses; wherefore in the first case the month from January 30th is the 28th or 29th of February in leap years, if the *terminus a quo* fell on the beginning of the day; it ends

on March 1st, if the *terminus a quo* fell on a later part of the day.

Here the difficulty may be mooted as to what is understood by the *beginning of a day*. The Code (can. 32) merely says that the days must be completed from midnight. Civil law, generally speaking, rejects fractions of a day.[7] Canon law, by enjoining computation "from moment to moment," if nothing is said to the contrary, considers fractions.[8] Hence, speaking of the beginning of a day (*initium diei*), the law means that part which, according to common usage, forms the first portion of the day. How far that can be stretched, is mere guesswork; but to extend it to noon would, in our opinion, be against the intention of the law as well as contrary to common usage. Nine o'clock would be about the limit.

5°. If a *recurrence of the same act* at stated times is in question, the term expires on the same recurring day, but the new act may be performed throughout the whole recurring day, for instance, profession after a term of three years, temporary vows, triennial elections, for instance, October 5th, 1917 — October 5th, 1920.

Can. 35

Tempus *utile* illud intelligitur quod pro exercitio aut prosecutione sui iuris ita alicui competit ut ignoranti aut agere non valenti non currat; *continuum,* quod nullam patitur interruptionem.

The *tempus utile* is the time granted for exercising or prosecuting certain rights, so that in case one should ignore it or be unable to make use of it, the lapse of time would not damage or

7 Blackstone-Cooley, *l. c.*, p. 141. 8 Reiffenstuel, II, 27, n. 111.

prevent him; the *tempus continuum* is that which runs without interruption.

The so-called *tempus utile* is distinguished from the *tempus continuum, i. e.,* time which runs continually without regard to ferial days or the presence or absence of persons, etc. For instance, if the *tempus utile* for a *restitutio in integrum* were four years, and one were not aware of having been wronged, the time would not commence with the day of the wrongdoing but with the day when the defendant realized that action must begin;[1] thus also in cases of summons or citations.

1 Cfr. Engel, I, 41, n. 11 de in integrum restitutione.

TITLE IV

ON RESCRIPTS

A rescript is a written answer given by a legitimate ecclesiastical superior, either directly, or indirectly through the medium of a competent tribunal, to a question proposed or a favor asked for. As we have stated above, as early as the eleventh century there were two kinds of papal letters, *litterae gratiae* and *litterae justitiae*. *Litterae gratiae* or rescripts of favor proceed from the mere liberality — although perhaps petitioned — of the pontiff or bishop in matters wholly subject to their good pleasure and uncontested, *e. g.*, a nomination to a domestic prelacy. *Litterae justitiae* refer to justiciable matter to be settled between contending parties in legal form, *e. g.*, boundary disputes, questions of precedence, etc.

The definition says that rescripts may be granted directly or indirectly. To understand the difference between the two species note the fact that, as a general rule, the Pope issues rescripts through the ordinary Roman tribunals; yet he is not bound to use that means (can. 43).

Besides, it has become customary to send rescripts granted by the Roman Curia to an *executor*. The executor, as a rule, is a dignitary, *i. e.*, one constituted in a real or honorary dignity, most commonly the Ordinary of the diocese or, for religious, the superior general or provincial. There is a distinction between the *executor*

voluntarius and the *executor necessarius;* the former acts as a judge, *i. e.,* he decides whether or not the rescript can be put into effect (can. 54); whereas the *executor necessarius* is obliged to sign and deliver the rescript to the person concerned. Whether an executor is *voluntarius* or *necessarius* depends on the clauses added to the rescript. If the conditional particles "*si*" or "*dummodo*" are to be found in the rescript, the executor is considered *voluntarius,* not a mere instrument for executing the will of the superior,[2] and hence is obliged to proceed as if he had received a *mandate* or authoritative commission, by which jurisdiction is given to him in the case (can. 55). These preliminary notions supposed, the Code first establishes *who are capable of demanding* a rescript, either from the Apostolic See or the Ordinaries, and lays down the rule that all may petition for a rescript, unless expressly incapacited under the law.

CAN. 36

§ 1. Rescripta tum Sedis Apostolicae tum aliorum Ordinariorum impetrari libere possunt ab omnibus qui expresse non prohibentur.

§ 2. Gratiae et dispensationes omne genus a Sede Apostolica concessae etiam censura irretitis validae sunt, salvo praescripto can. 2265, § 2, 2275, n. 3, 2283.

§ 1. Rescripts may be freely asked both from the Apostolic See and from other Ordinaries by all who are not expressly prohibited (from asking for them).

2 Sometimes an *exsecutor mixtus* is inserted between the two mentioned. An *exsecutor mixtus* is one who is authorized to execute *a gratia facienda,* which is a favor granted and only needs execution; this kind of executorship may be called a "*nudum ministerium.*"

§ 2. Favors and dispensations of all kinds granted by the Holy See are valid, even if the beneficiaries are under censure, with due regard, however, to can. 2265, § 2, can. 2275, n. 3, and can. 2283.

Favors and dispensations of all kinds granted by the Holy See even to censured persons are valid, *exceptis excipiendis*. The law declares incapable of validly receiving a rescript, those who are *excommunicated* or interdicted or suspended after a declaratory or condemnatory sentence, provided the penalty still affects them when the rescript arrives and no absolution or dispensation was granted or mentioned.[3] This is frequently done by the addition of the clause, "*absolutis a censuris*," etc., which has no other effect than to render the petitioner capable of receiving the rescript; hence *de facto* he is not absolved from excommunication.

It must be furthermore noted that, according to all authors, even excommunicated persons are allowed to ask for a rescript revoking their excommunication, interdict, suspension, etc., else the way of justice would be precluded to them.

Can. 37

Rescriptum impetrari potest pro alio etiam praeter eius assensum; et licet ipse possit gratia per rescriptum concessa non uti, rescriptum tamen valet ante eius acceptationem, nisi aliud ex appositis clausulis appareat.

A rescript may be obtained for another (or

[3] See canons 2217, § 1; 2223, § 4; 2232, 2243.

third) person even without the latter's consent; and though this third person may or may not avail himself of the favor conceded by the rescript, yet the rescript is valid before its acceptance, unless otherwise provided for in the appended clauses.

According to c. 17, 6°, III, 4, a favor, *e.g.*, a benefice, could be conferred validly, even though the grantee was not aware of it (absent); but only after he notified his acceptance could he claim it (*ius in beneficio.*) Our canon establishes this claim by the grant of the petition, but leaves it to the grantee to accept it or not.

The "appended clauses" depend on the good pleasure of the grantor, who will express them, but they suppose the capacity of receiving the rescript at the moment when it gets into the grantee's possession.

DATE AND REQUISITES

CAN. 38

Rescripta quibus gratia conceditur sine interiecto exsecutore, effectum habent a momento quo datae sunt litterae; cetera a tempore exsecutionis.

Rescripts by which a favor is granted without the agency of an executor, take effect from the date of their signature; all others, from the date of execution.

Hence, *e. g.*, a rescript granting a personal or, generally speaking, a private favor is valid as soon as the Pope has signed it. All other rescripts take effect from the date of the executor's signature.

What about a *telephone* or *telegraph* message? Leaving aside matrimonial and other weighty matters, the telephone or telegraph may be used in order to transmit notice whether the petition was granted or not. It is certain that the Papal Secretary of State may use this means. Generally speaking, the person from whom notice is demanded must be an official who is in a position to know. Private persons are not to be relied upon.

According to Canon 56 (*infra*, p. 145) the rescripts which are handed over to an executor demand execution *in writing* if they regard the *forum externum*. However, after the executor has properly investigated the matter and signed the document, he may, if asked for, transmit an answer by telephone or telegraph and send the written document afterwards. Note, however, that such a transmission is the exception, not the rule.[4]

The Code insists on written execution only for those rescripts which do not directly concern the conscience, and hence those touching the *forum conscientiae* may be transmitted by these "extraordinary" means, provided, of course the *sigillum confessionis* is safeguarded.

Can. 39

Conditiones in rescriptis tunc tantum essentiales pro eorundem validitate censentur, cum per particulas *si, dummodo,* vel aliam eiusdem significationis exprimuntur.

Conditions made in rescripts are essential to their validity only if they are expressed by the

[4] The Secretariate of State, 10 Dec., 1891, has declared this kind of transmission an extraordinary one. Cfr. De Smedt, *De Spons. et Mat.*, 1910, I, p. 532, p. 547.

particles *si, dummodo,* or others of the same meaning.

CAN. 40

In omnibus rescriptis subintelligenda est, etsi non expressa, conditio: *Si preces veritate nitantur,* salvo praescripto can. 45, 1054.

In all rescripts, even when not expressly stated, this condition must be understood: *If the request is founded on truth,* with due regard to can. 45 and 1054.

Phrases of similar meaning as *si* and *dummodo* are the particles *nisi, modo, non aliter;* but not the ablative absolute, for instance: *audita sacramentali, confessione, remoto scandalo, habito ordinarii consensu* and similar terms.[5] This condition, "*si preces veritate innitantur,*" is implied in every rescript, with the exception of "*motu proprio,*" with some modifications (see below). The reasons for a petition, and consequently for the validity of the grant, must actually exist at the time the rescript is signed by the grantor, provided no executor is assigned; if an executor is selected, the reason must be verified at the time when the executor signs the document. For instance, a rescript permitting a private oratory is valid when all the conditions for such an oratory are fulfilled at the date when the Ordinary (to whom such rescripts are generally directed) signs the paper. This is the meaning of Can. 41.

CAN. 41

In rescriptis quorum nullus est exsecutor, preces

5 Cf. Michiels, *Normae Generales,* II, 208 ff.

veritate nitantur oportet tempore quo rescriptum datum est; in ceteris tempore exsecutionis.

In rescripts for which no executor is appointed, the conditions upon which the petition is based must be real at the time the rescript is signed; in all others, at the time of the execution.

It may happen, however, that the grantor, and perhaps the executor also, were deceived by the petitioner, who either did not state the full truth (*subreptio*) or alleged a reason which had no foundation in fact (*obreptio*). Such a deception may arise either from ignorance or malice.[6] This difference is not mentioned in the Code, which simply says:

CAN. 42

§1. Reticentia veri, seu subreptio, in precibus non obstat quominus rescriptum vim habeat ratumque sit, dummodo expressa fuerint quae de stylo Curiae sunt ad validitatem exprimenda.

§ 2. Nec obstat expositio falsi, seu obreptio, dummodo vel unica causa proposita vel ex pluribus propositis una saltem motiva vera sit.

§ 3. Vitium obreptionis vel subreptionis in una tantum parte rescripti aliam non infirmat, si una simul plures gratiae per rescriptum concedantur.

§ 1. Failure to state the full truth (*subreptio*) in the petition does not prevent a rescript from being valid and going into effect, provided men-

6 Cfr. c. 20, X, I, 3, which chapter is called in the summary the "key of the whole title"; our canon disregards the distinction between *ignorance* and *malice*.

tion was made of whatever the *stylus Curiae* requires for validity.

§ 2. Neither is a rescript obtained by the allegation of a falsehood (*obreptio*) invalid, provided the sole reason, or at least one of the several reasons alleged, is true.

§ 3. Either defect, *obreptio* or *subreptio*, occurring in only one part of a rescript, does not invalidate the other parts, if several favors are granted simultaneously by the same rescript.

As to the first clause (§ 1), the *stylus Curiae* prescribes certain canonical reasons for matrimony, the different lines and degrees, as well as certain formularies to be used in obtaining faculties or dispensations from the various Roman Congregations. This customary style is, of course, best known to the agents engaged in business with these Congregations. If a *petition* is not properly drawn up, it is usually *returned to the petitioner,* to be corrected.[7]

As to § 2: The *motive cause* or final reason (can. 45) is the one which moves the superior to grant a petition. If, therefore, this one is false, the rescript will be null and void, and the petitioner can neither licitly nor validly use the favor granted therein.

Note that our canon makes a distinction in favor of *subreptio,* which the Corpus Juris did not admit under the circumstance of deliberate falsehood, either expressed or suppressed.[8] The new Code is also benign in admitting the *divisibility of a rescript* which contains sev-

7 The *stylus Curiae* has been described above; cfr. also Putzer, *Comment. in Facultates Apost.*, 1897, p. 15. The *clausulae* also belong to the "Roman Style."

8 Cfr. c. 20, X, I, 3.

eral favors, *e. g.*, that of saying *de requiem* and reciting other prayers instead of the Breviary.

To provide for a uniform procedure and to avoid confusion, as well as to prevent rescripts from being, as it were, received stealthily, the following two canons have been inserted:

CAN. 43

Gratia ab una Sacra Congregatione vel Officio Romanae Curiae denegata, invalide ab alia Sacra Congregatione vel Officio aut a loci Ordinario, etsi potestatem habente, conceditur sine assensu Sacrae Congregationis vel Officii quocum vel quibuscum agi coeptum fuit, salvo iure S. Poenitentiariae pro foro interno.

A favor denied by one Sacred Congregation or Office of the Roman Curia cannot validly be granted by another Congregation or Office, or by the local Ordinary, even though he have the power, except with the consent of the S. Congregation or Office which handled the case first,—without, however, violating the right of the S. Penitentiary in matters of conscience.

CAN. 44

§ 1. Nemo gratiam a proprio Ordinario denegatam ab alio Ordinario petat, nulla facta denegationis mentione; facta autem mentione, Ordinarius gratiam ne concedat, nisi habitis a priore Ordinario denegationis rationibus.

§ 2. Gratia a Vicario Generali denegata et postea, nulla facta huius denegationis mentione, ab Episcopo impetrata, invalida est; gratia autem ab Episcopo

denegata nequit valide, etiam facta denegationis mentione, a Vicario Generali, non consentiente Episcopo, impetrari.

§ 1. No one shall ask another Ordinary for a favor refused by his own Ordinary without making mention of the refusal; if mention is made, the second Ordinary shall not grant the favor until informed of the reasons for the former Ordinary's refusal.

§ 2. A favor denied by the Vicar General and later obtained from the Bishop, without mention of the refusal, is invalid; a favor denied by the Bishop cannot validly be asked of the Vicar General without the Bishop's consent, even if mention of the refusal is made.

The underlying principle of this regulation is that the Roman Curia, as well as the Bishop and his Vicar General form a unit. Two different Bishops constitute two separate tribunals, wherefore in § 1 of Can. 44 the invalidity of the rescripts is not asserted,[9] but merely their illicitness, for the purpose touched above.

THE CLAUSE "MOTU PROPRIO"

Boniface VIII made a distinction between a rescript given "Motu proprio," which, he says, proceeds from pure liberality, and one obtained by petition.[10] In course of time, especially since Innocent VIII, "Motu proprios" became more frequent and were no longer acts of grace,

9 The "novum genus mercimonii" mentioned in c. 28, h. t., is thereby precluded.

10 Cf. c. 23, 6°, III, 4 de praebendis.

but could be petitioned for (*ad instantiam*); the Supreme Pontiff merely added "Motu proprio" in order to give full and unlimited effect. The new Code has partly retained this custom and partly modified it, as follows:

CAN. 45

Cum rescriptis ad preces alicuius impetratis apponitur clausula: *Motu proprio*, valent quidem ea, si in precibus reticeatur veritas alioquin necessario exprimenda, non tamen si falsa causa finalis eaque unica proponatur, salvo praescripto can. 1054.

Rescripts issued with the clause *Motu proprio* are valid, even if subreptitious, unless the final reason, if it be the only one, is falsely alleged.

For instance, if a rescript were obtained dispensing the petitioner from reciting the Breviary on account of weak eyes, and this claim rested on mere imagination, the rescript would be invalid. There are three other cases in which a "Motu proprio" is of no effect:

CAN. 46

Rescripta etiam *Motu proprio* concessa personae de iure communi inhabili ad consequendam gratiam de qua agitur, itemque edita contra alicuius loci legitimam consuetudinem vel statutum peculiare, vel contra ius alteri iam quaesitum, non sustinentur, nisi expressa derogatoria clausula rescripto apponatur.

A rescript, even though granted *Motu proprio*, is of no effect if given to a person incapable of the favor granted under the common law, or against the lawful custom or particular statute of the

place, or against the acquired right of another person, unless a derogatory clause is appended to the rescript.

A rescript is invalid if given to a person who is incapable of the favor [11] granted because the law itself makes him incapable. The superior is not supposed to contradict the law. A favor is equally invalid if given against the lawful custom or a particular statute of the place or if it trenches on the lawfully acquired right of a third person. The reason for the last two provisions is the ignorance of a superior concerning particular laws and the *jura tertii,* which he is not supposed to infringe upon.[12] However, if a derogatory clause is appended directly affecting the incapability of the person, or particular laws, or the *jus tertii,* the rescript is valid. Exception is made in favor of matrimonial dispensations from minor impediments; see can. 1054.

MISTAKES IN RESCRIPTS

CAN. 47

Rescripta non fiunt irrita ob errorem in nomine personae cui vel a qua conceduntur, aut loci in quo ipsa moratur, aut rei de qua agitur, dummodo, iudicio Ordinarii, nulla sit de ipsa persona vel re dubitatio.

Errors affecting the name of the person to whom or by whom a rescript is issued, or the place where the person dwells,[13] or the favor itself, do

11 For instance, if the petitioner suffers from irregularity, defect of age, illegitimate birth. Reiffenstuel, I, 3, n. 208 f. Of course, if the rescript is issued precisely to take away these defects, the petitioner becomes capable of the favor and consequently of the rescript.

12 Cfr. c. 8, 6°, I, 3.

13 However, a mistake about the diocese would invalidate the rescript. Cfr. c. 34, X, I, 3.

not render a rescript invalid, if the Ordinary is persuaded that no doubt exists as to the identity of the person or the thing asked for.

We may add, however, that as formerly, so now, a manifest error or an erasure in the dispositive and essential part would cast serious suspicion upon the genuineness of a papal document.[14]

PREFERENCE, INTERPRETATION, AND PRESENTATION

If several rescripts were obtained about one and the same question or subject-matter, *e. g.*, some point of rubrics, let us say the recital of old or new canticles,[15] one rescript contradicting the other, the question arises, which one must be followed? The Code answers as follows:

CAN. 48

§ 1. Si contingat ut de una eademque re duo rescripta inter se contraria impetrentur, peculiare, in iis quae peculiariter exprimuntur, praevalet generali.

§ 2. Si sint aeque peculiaria aut generalia, prius tempore praevalet posteriori, nisi in altero fiat expressa mentio de priore, aut nisi prior impetratur dolo vel notabili negligentia suo rescripto usus non fuerit.

§ 3. Quod si eodem die fuerint concessa nec liqueat uter prior impetraverit, utrumque irritum est, et, si res ferat, rursus ad eum qui rescripta dedit, est recurrendum.

§ 1. If it should happen that two rescripts re-

14 C. 11, X, I, 3; c. 6, X, II, 22 de fide instrumentorum.

15 This happened in the Swiss-American Congregation of the Benedictine Order concerning a decree of June 9, 1915, and a rescript of later date; but the mistake was made in Rome.

ferring to the same matter are contradictory, the rescript containing a peculiar or particular enactment must be accepted in preference to the one containing a general enactment.

§ 2. If both rescripts are alike particular or general, the one which is dated or received earlier must be preferred to that of later date, unless specific mention is made in the latter rescript of the earlier one, or unless the first petitioner, through fraud or notable negligence, has not made use of the earlier rescript.

§ 3. If the two rescripts were issued on the same day, and it is not apparent which was obtained first, both are invalid, and, if feasible, recourse must be had to the grantor.

According to § 1, a special favor is to be preferred to a general one, because "species derogat generi." [16]

Fraud may be committed by withholding the document, and notable negligence would be failure to make use of the favor granted for one year.[17]

CAN. 49

Rescripta intelligenda sunt secundum propriam verborum significationem et communem loquendi usum, nec debent ad casus alios praeter expressos extendi.

Rescripts must be interpreted according to the proper meaning of the words and common par-

16 Reg. juris 34 in 6°.

17 Cf. cc. 9, 23, X, I, 3. Fraud is possible in marriage rescripts, but especially in rescripts of justice.

lance, nor are they to be extended to cases not mentioned therein.[18]

Four kinds of rescripts must be interpreted *strictly, i. e.,* neither extensively nor restrictively, but according to the exact wording of the text, to wit: (a) rescripts of justice which are intended to settle a controversy; (b) those which may injure the acquired rights of others; (c) those which are adverse to the special laws of private persons; and (d) those which contain an appointment to an ecclesiastical benefice. All other rescripts may be broadly and benignly interpreted; "*favores ampliandi sunt.*" The reason for interpreting the first kind strictly is that the superior wishes to prevent litigation and this object could not be accomplished if a broad interpretation were admissible.[19] The reason for interpreting the second and third kind of rescripts strictly must be sought in the intention of the superior of defending the rights of others, especially if these are acquired by privileges, *e. g.,* of exempt religious. The reason for a strict interpretation of rescripts in beneficiary matters lies in the fact that such rescripts favor ambition. Hence if, *e. g.,* a dignity or office in a cathedral chapter is conferred, the two are not to be taken promiscuously. All other rescripts of favor are susceptible of a broad interpretation, because "*plenissima alias in beneficiis interpretatio facienda.*" [20]

As to *presentation,* which is nothing else but the showing of the rescript to the Ordinary, it must be observed that this act, though not necessary, is at least very becoming, inasmuch as the diocesan Bishop is the proper guardian of law and discipline in his territory. Hence, in

18 C. 14, 6°, I, 3.

19 Cfr. c. 28, X, I, 3.

20 Cfr. cc. 4, 27, 6°, III, 4 de praebendis.

rescripts giving faculties for various blessings the clausula is found, "*cum consensu Ordinarii.*"

CAN. 50

In dubio, rescripta quae ad lites referuntur, vel iura aliis quaesita laedunt, vel adversantur legi in commodum privatorum, vel denique impetrata fuerunt ad beneficii ecclesiastici assecutionem, strictam interpretationem recipiunt; cetera omnia latam.

In case of doubt, rescripts which pertain to disputes, or which trench on the acquired rights of others, or which reverse the law in favor of private parties, or, finally, which were given for the attainment of an ecclesiastical benefice, demand a strict interpretation; all others may be interpreted broadly.

The following canons state the duty of presentation as limited by certain conditions.

CAN. 51

Rescriptum Sedis Apostolicae in quo nullus datur exsecutor, tunc tantum debet Ordinario impetrantis praesentari, cum id in eisdem litteris praecipitur, aut de rebus agitur publicis, aut comprobare conditiones quasdam oportet.

A rescript of the Apostolic See which designates no executor must be presented to the Ordinary of the petitioner only in case the presentation is enjoined in the document itself, or if

there is question of public affairs, or if there are conditions that are subject to probation [*i. e.*, ascertaining the truth].

The first condition is evident. The second, which concerns public acts (*de rebus agitur publicis*), seems to refer to such rescripts as contain a favor to be used publicly. Such favors would be, for instance, privileges attached to a sanctuary or benefice, or a distinctive ecclesiastical dress, or permission to collect alms.[21] The last condition evidently has reference to rescripts regarding oratories, matrimonial dispensations, etc.

As to the *time* within which rescripts must be presented, canon 52 states:

CAN. 52

Rescripta, quorum praesentationi nullum est definitum tempus, possunt exsecutori exhiberi quovis tempore, modo absit fraus et dolus.

Rescripts for the presentation of which no definite time is set, may be exhibited to the executor at any time, provided fraud and deceit are excluded.

Note that this canon does not distinguish between rescripts of justice and rescripts of favor,[22] but embraces both kinds, provided only fraud and deceit be avoided; for fraud and deceit deserve no indulgence and are contrary to the spirit of order.

21 Cfr. c. 6, X, I, 3 concerning Cistercians, who may collect tithes without heeding an apostolic rescript, unless mention is made therein of that privilege.

22 Formerly rescripts of justice had to be presented within a year from the date of receipt; the Code makes no distinction between the two species of rescripts in this regard.

THE OFFICE OF EXECUTOR

We said above that it is the rule to choose an "executor" to investigate the matter and persons demanding a rescript. Certain duties, therefore, are incumbent on the executor, who may become the cause of grave mistakes which render a rescript invalid. Therefore the following canons more closely describe the functions of the executor.

CAN. 53

Rescripti exsecutor invalide munere suo fungitur, antequam litteras receperit earumque authenticitatem et integritatem recognoverit, nisi praevia earundem notitia ad eum fuerit auctoritate rescribentis transmissa.

The executor of a rescript acts invalidly if he acts before he has received the letters and determined their authenticity and integrity, unless he has been previously informed of their contents by authority of the grantor.

Hence, as soon as the executor has received the document, he must look at the signature and the seal, to ascertain whence it came; for this is to establish authenticity. Then he may peruse the contents, assuring himself that nothing substantial is wanting and that all the necessary papers are included. After that he will determine the subject-matter or nature of the case. Then he must carefully ponder over the clausulae, which contain certain conditions for the executor as well as the petitioner. Before he has done all this the executor cannot validly proceed to carry out the rescript, unless he

has been informed by telegraph, telephone or other means as to the contents of the document. This information must come from the grantor or an official connected with the grantor. Next he must ascertain from the *clausulae* whether he is an *exsecutor necessarius* or *voluntarius.* Thus, *e. g.,* "*si constiterit*" or "*constito tibi,*" "*conscientiam tuam oneramus,*" [23] etc., are indicative of an *exsecutor voluntarius* (or at least *mixtus*), whilst the absence of such clauses permits one to presume that he is merely an *exsecutor necessarius, i. e.,* one who simply delivers the rescript. However, even if he is an *exsecutor necessarius* and cannot refuse the granting of the favor, circumstances may be such as to cause him to withhold the execution. Three cases only are enumerated.

Can. 54

§ 1. Si in rescripto committatur merum exsecutionis ministerium, exsecutio rescripti denegari non potest, nisi aut manifeste pateat rescriptum vitio subreptionis aut obreptionis nullum esse, aut in rescripto apponantur conditiones quas exsecutori constet non esse impletas, aut qui rescriptum impetravit adeo, iudicio exsecutoris, videatur indignus ut aliorum offensioni futura sit gratiae concessio; quod ultimum si accidat, exsecutor, intermissa exsecutione, statim ea de re certiorem faciat rescribentem.

§ 2. Quod si in rescripto concessio gratiae exsecutori committatur, ipsius est pro suo prudenti arbitrio et conscientia gratiam concedere vel denegare.

23 This clausula is not, properly speaking, conditional, but intended to render the executor cautious. It means that the business is committed to the prudence of an honest man with common sense, who must follow the dictates of legal justice, but it also signifies that the executor cannot subdelegate his office. Cfr. Barbosa, *Tractatus Varii,* de clausulis, cl. 24, p. 274.

§ 1. If a rescript commissions the executor merely to carry out its terms, he is not allowed to refuse to do so, unless it is evident that the rescript is void in consequence of a *subreptio* or *obreptio,* or the executor is satisfied that the conditions appended to the rescript are not fulfilled, or if the petitioner, in the judgment of the executor, is so unworthy of the favor granted that the grant would prove offensive to others; in the last-mentioned case the executor should not proceed to execute his commission but immediately notify the grantor.

§ 2. If the granting of a favor is committed to the executor, the latter may either grant or deny it, according to his prudent judgment and conscience.

As to the first point: The executor is supposed to know the circumstances of the petitioner, *e. g.,* in matrimonial dispensations, and as a rule it is not difficult for him to judge whether or not the truth has been concealed. *Obreptio* and *subreptio* are mentioned, hence the executor is bound to investigate the existence or absence of the reasons alleged.

As to the second point, it will be noticed that the conditions must be fulfilled at the time of the execution, but nothing is said about the future. Hence all the conditions for a private oratory, for instance, must be previously complied with, whereas, in a rescript for a mixed marriage the future fulfillment of the conditions need not concern the executor.

As to the third point, it may be noted that the position of the executor may become very ticklish because of the vagueness of the term *indignus* (unworthy). If we speak of one being *indignus* in an election, we mean that he lacks the required qualities. Perhaps a more reliable standard is furnished by a comparison with the refusal of administering the sacraments to "*indigne petentibus.*" An "*indignus*" in the sense of our canon therefore is probably a public sinner.[24] The grant may be offensive to the faithful or to others, to whom it might give an occasion to belittle the Church. If that be the case, the executor is bound to postpone the execution and inform the grantor.

If the executor is a *voluntarius, i. e.,* may either grant or refuse the favor according to his good judgment and conscience, all depends upon him and he must bear the consequences of his action. There is one notable consequence attending such a form of commission, *viz.,* that the rescript expires with the death of the executor.[25]

Can. 55

Exsecutor procedere debet ad mandati normam, et nisi conditiones essentiales in litteris appositas impleverit ac substantialem procedendi formam servaverit, irrita est exsecutio.

The executor is obliged to proceed as if he had received a mandate, and unless he shall have fulfilled the essential conditions laid down in the rescript, and followed in substance the required

24 A notorious Freemason, or a persecutor of the Church and hierarchy, a *concubinarius publicus,* all these would fall under the category of *indigni.*

25 "Arbitrium expirat morte illius, qui illud habet"; cfr. Barbosa, claus. 11, p. 364.

form of proceeding, the execution is invalid.

A *mandatum,* broadly speaking, is a rescript by which a superior commands or prescribes something. There are two kinds of *mandatum* which may here come into question: the *mandatum apostolicum,* used in the provision or conferring of benefices, and the *mandatum procuratorium,* by which one is made procurator or empowered to act as proxy.[26] The latter is here to be considered, and what is said in general about a mandate of proxy applies to the present case, and therefore the executor must observe the form of the mandate. This he does if he grants neither more nor less than is expressed in the rescript, *e. g.,* if the rescript permits a secularization *ad tempus,* the executor cannot grant it *in perpetuum.* He must furthermore observe the limits of the mandate as to persons, time, and conditions.[27] Finally, in rescripts of justice, the executor must follow the summary procedure explained in Book IV.

CAN. 56

Exsecutio rescriptorum quae forum externum respiciunt, scripto facienda est.

The execution of rescripts which affect the external forum must be made in writing.

CAN. 57

§ 1. Rescriptorum exsecutor potest alium pro suo prudenti arbitrio sibi substituere, nisi substitutio prohibita fuerit, aut substituti persona praefinita.

26 Reiffenstuel, I, 3, 21; I, 38, nn. 72 ff.; de procuratoribus.

27 Barbosa, *l. c.,* Axioma 144: "quia paria sunt, non habere mandatum vel non servare formam mandati."

§ 2. **Si tamen fuerit electa industria personae, exsecutori non licet alteri committere, nisi actus praeparatorios.**

§ 1. The executor of a rescript may, if he prudently judges fit, appoint another in his place, unless such substitution is forbidden or some other person has been designated.

§ 2. If, however, an executor has been chosen by reason of his personal qualities, he may not delegate his office to another, but only the preliminary acts.

CAN. 58

Rescripta quaelibet exsecutioni mandari possunt etiam ab exsecutoris successore in dignitate vel officio, nisi fuerit electa industria personae.

A rescript may be executed by the successor in dignity or office of the original executor, unless the latter had been appointed on account of his personal qualities.

Since the code mentions no special reason for not attending personally to the affair, it is left to the executor to delegate another. Thus a Bishop may give general permission to his Vicar-general or Chancellor to attend to such matters unless such action is either expressly or implicitly forbidden; for it may be that a law does not allow the Ordinary to give such a general permission, which cases will be noted in the course of this commentary. Besides, if the executor is chosen for his *personal qualities, e. g.,* his knowledge or acquaintance with

the case and the persons involved, or for peculiar merit, substitution is not permissible. The same holds good concerning the successor in dignity or office. *Dignity* here means jurisdiction and precedence, not merely dignitaries, for such do not succeed one other. Whether the term *office* is to be taken in the general sense of an ecclesiastical office, or in the stricter sense of *officium,* which implies neither jurisdiction nor precedence but only administration, is not stated, but the text seems to indicate the latter. Hence, *e. g.,* the custodian of a cathedral church or the secretary or chancellor of a Bishop, are officials to the practical intent of this canon.[28]

CAN. 59

§ 1. Exsecutori fas est, si quoquo modo in rescriptorum exsecutione erraverit, iterum eadem exsecutioni mandare.

§ 2. Quod attinet ad taxas pro rescriptorum exsecutione, servetur praescriptum can. 1507, § 1.

§ 1. If an executor has made a mistake of any kind in the execution of a rescript, he has the right to repeat the execution.

§ 2. As regards the fees for the execution of a rescript, canon 1507, § 1 must be observed.

The fees for the execution of rescripts are governed by well-defined rules for each ecclesiastical province, which rules are prescribed by the Holy See, to whom also is reserved the approbation of taxation laws to be followed in a province (can. 1507).

28 Cfr. Barbosa, *Tractatus Varii,* Appellatio 126, p. 269; the custos of a cathedral or collegiate chapter is looked upon as a *personatus* (cf. Book II, on cathedral chapters).

RECALL AND CESSATION OF RESCRIPTS

The effect of a rescript — except it be a mere faculty — generally lasts forever or at least as long as the reason for which the petition was made. But it may be revoked. Hence

CAN. 60

§ 1. Rescriptum, per peculiarem Superioris actum revocatum, perdurat usque dum revocatio ei, qui illud obtinuit, significetur.

§ 2. Per legem contrariam nulla rescripta revocantur, nisi aliud in ipsa lege caveatur, aut lex lata sit a Superiore ipsius rescribentis.

§ 1. If a rescript is revoked by a special act of a superior, it does not lose its validity until the revocation has been duly intimated to the petitioner.

§ 2. No rescript is recalled by a contrary law, unless the law expressly so provides, or unless it is given by the superior of the one who granted the rescript.

CAN. 61

Per Apostolicae Sedis aut dioecesis vacationem nullum eiusdem Sedis Apostolicae aut Ordinarii rescriptum perimitur, nisi aliud ex additis clausulis appareat, aut rescriptum contineat potestatem alicui factam concedendi gratiam peculiaribus personis in eodem expressis, et res adhuc integra sit.

A rescript does not lose its force by reason of the vacancy of the Holy See or of a diocese, unless

the contrary appears from the respective *clausulae,* or unless the rescript conveys the power of granting a favor to particular persons expressly named therein, and the matter has not yet been made the subject of litigation.

A rescript might be repealed by the issuing of another rescript, but unless the second rescript mentions the former as abolished, the former rescript remains in force. Here the act of repeal is not express and explicit and must be formally intimated to the petitioner or owner of the rescript. However, a sort of tacit recall is admitted, *viz.,* by a *contrary law,* which must expressly mention the rescripts recalled or must have been issued by the superior of the one who issued the rescript. This latter clause evidently refers to the Pope in regard to a Bishop who may have granted a rescript, and means that the Sovereign Pontiff may cancel a rescript issued by an Ordinary. But here the rules of interpreting laws must be applied. The canon properly speaks of *expiring* rescripts. It was formerly held that rescripts of justice expired with the death or resignation of the grantor, *re adhuc integra.* But canon 61 makes no such distinction, and hence a rescript does not become extinct by the death of the pontiff or bishop who gave it. An exception is made when there is a clause signifying the intention of the grantor to concede the favor granted only during his life-time or for a certain limited period. *Clausulae* of that kind would apparently be the following: "*usque ad beneplacitum nostrum,*" "*usque ad beneplacitum Sedis Apostolicae,*" "*donec revocavero.*" The first clausula would extinguish a rescript [29] at the death of the grantor,

29 Cf. c. 5, 6°, I, 3; cf. can. 73; the opinion of Laurentius, *Inst.*

but the second (*"usque ad benep. S. Ap."*) would not, because the Apostolic See does not die;[30] nor does the last (*"donec revocavero"*), according to weighty authors, extinguish the rescript, because, they say, a positive act is required for the repeal of a rescript,[31] an opinion which seems to be supported by canon 60, § 1.

The other condition under which a rescript elapses at the death of the grantor consists in the direct faculty given to the executor to grant a favor to specially named persons. For in that case the executor acts as procurator, — at least this seems to be the underlying principle,— who has received a special mandate, which naturally ceases with the death of the *mandans,* unless the business has taken a juridical turn (*res adhuc integra*) and the juridical stage has been reached, if citations or summons have been legally issued or the parties have spontaneously appeared before the judge, or in this case, before the executor.[32]

The last canon of this title, which certainly has been dealt with liberally in our Code, says that if a rescript contains a privilege or dispensation, the rules for privileges and dispensations laid down in the following canons must be observed.

Can. 62

Si rescriptum contineat non simplicem gratiam, sed privilegium vel dispensationem, serventur insuper praescripta canonum qui sequuntur.

If a rescript contains, not a simple favor, but a

Iuris Eccl., n. 296, is destitute of foundation.

30 Cf. c. 5, 6°, I, 3.

31 Cf. Barbosa, *l. c.*, claus. 43, p. 402; Reiffenstuel, I, 3, n. 263.

32 Cf. can. 1725, which settles the controversy about the moment when a matter ceases to be *integra.*

privilege or dispensation, then besides [the rules laid down in the preceding canons] the regulations established in the following canons must be observed.

TITLE V

ON PRIVILEGES

A special class of laws is that dealing with privileges. A privilege (*privilegium, lex privata*) may be defined as "a more or less permanent concession made by the legislator against (or beyond) the law."[1]

A privilege is a *law,* and hence falls under the power of the legislator only in so far as he can establish laws. If a privilege contains a concession which the law prohibits, it is a privilege *against the law.* If a privilege grants a right beyond what the law has already granted, it is said to go *beyond the law* (*praeter jus*), as *e. g.,* the privilege of absolving from reserved cases. Properly speaking only a *privilege against the law* is truly a privilege,[2] though faculties are justly enumerated among the *privileges beyond the law* (can. 66, § 1).

HISTORICAL NOTE

It is evident that the theory of privileges must have developed apace with the practice of the Roman See. Though privileges were granted and revoked by the popes before the great collections of ecclesiastic law were made, the doctrinal exposition of privileges began with Gratian.[3] In a famous dictum the Magister solves the objection raised by the necessity of strictly observing the canons of councils and the decrees of popes as follows: The

1 Cf. tit. 33, bk. V, Decretal., and the commentators thereon, for instance, Engel, Reiffenstuel, and Suarez, *De Legibus.*

2 Reiffenstuel, *l. c.,* n. 8.

3 Cf. dictum ad c. 16, C. 25, q. 1; c. 30, C. 11, q. 1; c. 4, C. 24, q. 1.

Roman Church has the authority to establish laws, but she is not bound by them, because she is the head and support (*caput et cardo*) of all the churches, and all laws have attached to them the implicit clause, "*salvo jure sanctae Romanae Ecclesiae.*" Hence if privileges are granted which apparently are against the common law, they do not clash with the right of the Church, because all privileges are reserved to her. From this point of view it followed, of course, that no privilege would be granted except for the honor and utility of the Church, and that privileges were revocable. Gratian's teaching was an innovation only in so far as this principle had not been laid down in any law-book before him. But in substance it simply embodied the practice which the Roman Court had followed for about a century. As the papal power developed under the "protection of St. Peter," the theory of privileges assumed a more detailed and definite form. This was the case especially in the eleventh and twelfth centuries.[4] We must add that in course of time clerical privileges and exemptions to a great extent lost their original character of privileges and became, as it were, part and parcel of the common law.

DIVISION OF PRIVILEGES

Of the many divisions of privileges, the following is to our purpose:

a) A *personal* privilege is one granted to a person for a reason inherent exclusively in that person, *e. g.*, the wearing of the cappa magna or purple skullcap, if given not to the office but to the person. A *real* privilege is one attached to a thing, place, office, or dignity; *e. g.*, the *privilegium altaris* or a privilege given to a sanctuary.

4 Cf. Saegmueller in the *Tüb. Quartalschrift*, 1907, p. 93 ff.

A *mixed* privilege is one granted to a corporation or society or confraternity as such.

b) A *favorable* privilege is one containing a mere favor, without prejudice to a third person. An *odious* privilege is one involving prejudice or detriment to another, *e. g.,* freedom from taxation or tithes.

c) Privileges are granted in various *forms,* either in writing or by word of mouth, either *motu proprio* or by petition, either absolutely (*per se*) or *ad instar.* A privilege granted in *writing* is always safer. A written document is required where injury to another is involved, unless an orally granted privilege can be proved by witnesses. Otherwise an *oral* privilege may be used personally as long as no legitimate authority or injured third party demands proof (can. 79).

d) A privilege given *absolutely* or *per se* is one granted without respect or reference to pre-existing privileges. A privilege *ad instar* refers directly to a pre-existing pattern. Thus, *e. g.,* most of the privileges granted to religious and confraternities are *ad instar.*

ACQUISITION OF PRIVILEGES

A privilege being a law in favor of private persons, proceeds from the same power as the law. Hence the Sovereign Pontiff can grant privileges against the common ecclesiastical law, but not against the natural or divine law. It matters little, *per se,* whether he concedes these privileges in writing or orally (*vivae vocis oraculo*), directly, *i. e.,* absolutely, or indirectly, *i. e., ad instar,* for he has the power to choose the mode of granting privileges. Hence the first canon of this title declares that privileges may be obtained both by direct concession and communication and through legitimate custom or prescrip-

tion, and that centennial or immemorial possession creates a presumption in favor of a privilege.

CAN. 63

§ 1. Privilegia acquiri possunt non solum per directam concessionem competentis auctoritatis et per communicationem, sed etiam per legitimam consuetudinem aut praescriptionem.

§ 2. Possessio centenaria vel immemorabilis inducit praesumptionem concessi privilegii.

§ 1. Privileges can be acquired not only by direct concession on the part of legitimate authority and by communication, but likewise by legitimate custom or prescription.

§ 2. Centenary or immemorial possession of a privilege is a presumption in favor of its genuineness.

There is, then, a threefold way of acquiring ecclesiastical privileges: by direct concession on the part of a competent authority (pope or bishop), by communication, and by prescription.

The first is evident and needs no explanation.

Communication means partaking of a privilege either by extension or by aggregation (*per connectionem*). Thus if a confraternity is aggregated to an archconfraternity, it shares the privileges of the latter. A privilege may be acquired also by *explicit application*, the privileges granted to some being expressly conceded to others in the same manner, measure and form, yet with the effect that the latter grantees enjoy these privileges absolutely and independently of the former. This is called

communicatio plena et absoluta, or *aeque principalis,* whilst the former is *communicatio imperfecta et relativa* or *accessoria.* A complete and absolute communication of privileges formerly took place between all mendicant orders. Excepted from communication are the so-called "exorbitant" privileges and such as are styled "incommunicable." [5]

The third method of acquiring a privilege is by *custom* or *prescription.* This has been the general teaching of canonists, based on a famous decretal of Innocent III. In this decretal the words "*contraria consuetudo*" occur,[6] and, since all canonists insisted on prescription, they simply said: "*privilegium potest acquiri praescriptione seu consuetudine legitime praescripta.*" [7] This *opinio communis* receives, as it were, official sanction in the present canon.

The length of time required for prescription must be measured according to canons 27 f., quoted above; it is, besides, determined more closely by § 2 of can. 63.

Possession here means, not only actual occupation but the right of possessing a thing.[8] Such possession lasting for a century or time immemorial creates a *presumption* that the privilege is real and authentic. This presumption, not being further described, is to be taken as a simple *praesumptio juris,* which must cede to truth if conclusively disproved. Thus, *e. g.,* if it be proved that regulars who have held a parish for forty or more years, never obtained a privilege to that effect, the Bishop can claim the parish for the secular clergy.

[5] Only if a Bull contains the words, "etiam incommunicabilia," are these privileges included; see, *e. g.,* the Const. of Urban VIII, "Plantata," of July 12, 1633, in the *Bullarium Cong. Angl. O.S.B.,* 1912, pp. 5 ff.

[6] C. 13, Novit., X, II, 1 de judiciis.

[7] Reiffenstuel, V, 33, n. 39.

[8] "Detentio rei corporis et animi et juris adminiculo."

The legislator now turns to the second mode of acquiring a privilege, which is more subject to abuse.

CAN. 64

Per communicationem privilegiorum, etiam in forma aeque principali, ea tantum privilegia impertita censentur, quae directe, perpetuo et sine speciali relatione ad certum locum aut rem aut personam concessa fuerant primo privilegiario, habita etiam ratione capacitatis subiecti, cui fit communicatio.

In the communication of privileges, even that called *aeque principalis,* only those privileges are included which were imparted to the original grantee directly, forever, and without special relation to a certain place, thing or person, and with due consideration of the capability of the receiver.

Evidently the Code wishes to clear up the nature of *communicatio,* especially as espoused by religious orders; yet, in the main, it adopts the ancient solid doctrine. Privileges which were *not directly* granted cannot be communicated. This provision is perhaps new, but it is wholesome, for otherwise privileges might be claimed over which the legislator has no control, and unduly multiplied. Religious orders under this canon cannot by communication claim a privilege which was already granted to another order by communication. However, this law is not retroactive, and hence the orders may retain what they possess, except where the Code rules differently.

A privilege, to be communicable, must have been

granted *forever*. Therefore spiritual favors granted *ad quinquennium, e. g.,* are not communicable.[9]

Lastly, privileges granted to *particular* persons, places, or things cannot be transferred to others. For instance, the privilege of wearing a purple skullcap, given on account of personal merit and distinction, the privilege given to a special sanctuary or to a particular altar or sacred object, are incommunicable.

Note, too, that the persons or subjects to whom a communication of privilege is made, are capable thereof only in so far as their condition and position render them apt. Thus nuns (*moniales*) are not capable of enjoying all the privileges granted to monks or regulars, *e. g.,* that of preaching, absolving, etc., although they may be capable of others.

The following canon determines the *extent* of a *communicatio accessoria* (*ad instar*):

CAN. 65

Cum privilegia acquiruntur per communicationem in forma accessoria, augentur, imminuuntur vel amittuntur ipso facto, si forte augeantur, imminuantur vel cessent in principali privilegiario; secus si acquirantur per communicationem in forma aeque principali.

Privileges acquired by communication in *forma accessoria*, are increased, diminished or lost to the second grantee in proportion to their increase, decrease, or loss in the original grantee; which rule is not, however, to be applied to the *communicatio absoluta* or *aeque principalis*.

9 Cf. Antonius de Spiritu S., Ord. Carm., *Directorium Regular.*, tract. I, disp. 1, sectio 3, n. 42.

Hence, if an archconfraternity loses a part or all of its indulgences, they are also lost to the aggregated confraternities. This rule does not hold good in the communication of religious orders, wherefore, if one religious community were suppressed, another, which had received a privilege from it by communication, might continue to enjoy the same.

FACULTIES

A special canon treats of *faculties,* which term here means certain rights denied by common law but granted by special privilege. It follows from the nature of a faculty that it can be given only by one who can modify the common law. This one is primarily the Pope, though bishops also may grant faculties concerning matters subject to their legislation.[10] Since the sixteenth century special faculties were granted chiefly to the German bishops, and classified in certain formularies, *pro foro externo* and *pro foro interno, quinquennales* and *triennales,* and for a determined number of cases.[11] Their object is as wide as ecclesiastical discipline itself, and comprises especially dispensations, absolutions, and licenses for performing acts otherwise prohibited by law, *e. g.,* reading forbidden books.

The Code says with regard to these faculties:

CAN. 66

§ 1. Facultates habituales quae conceduntur vel in

10 For instance, hearing confessions, preaching, etc.

11 Cf. Putzer, *Comment. in Facult. apost.,* 1897, ed. 4.—For the formularies containing the faculties granted to the bishops of the U. S. see Sabetti-Barrett, *Theol. Moralis,* 1917. p. 1081 ff. These faculties, His Excellency the Apostolic Delegate, Most Rev. J. Bonzano, had the kindness to inform the author, are *extraordinary,* and therefore liable to modification or repeal.

perpetuum vel ad praefinitum tempus aut certum numerum casuum, accensentur privilegiis praeter ius.

§ 2. Nisi in earum concessione electa fuerit industria personae aut aliud expresse cautum sit, facultates habituales, Episcopo aliisve de quibus in can. 198, § 1 ab Apostolica Sede concessae, non evanescunt, resoluto iure Ordinarii cui concessae sunt, etiamsi ipse eas exsequi coeperit, sed transeunt ad Ordinarios qui ipsi in regimine succedunt; item concessae Episcopo competunt quoque Vicario Generali.

§ 3. Concessa facultas secumfert alias quoque potestates quae ad illius usum sunt necessariae; quare in facultate dispensandi includitur etiam potestas absolvendi a poenis ecclesiasticis, si quae forte obstent, sed ad effectum dumtaxat dispensationis consequendae.

§ 1. Habitual faculties, granted for ever, or for a limited time, or for a definite number of cases, are reckoned among privileges beyond the law.

§ 2. Unless they were conceded for personal reasons, or unless the law provides otherwise, habitual faculties do not expire with the authority of the Ordinary (or others; see can. 198, § 1) to whom they have been granted by the Apostolic See, even though he may have begun to execute them, but pass over to those who succeed him in office; faculties granted to the Bishop are intended also for the Vicar General.

§ 3. A faculty implies all the powers necessary for its exercise; hence the faculty of dispensing includes the faculty of absolving from

censures, if necessary, but only for the purpose of receiving the dispensation.

As to § 1 note: Habitual faculties are those which are commonly granted to bishops either for a certain time or for a limited number of cases, and are, as it were, concomitants of the episcopal office. As they are numbered among *privileges,* the rules of interpreting privileges must be applied to them, *ceteris paribus.*

As to § 2: These habitual faculties do not expire with the cessation of the Ordinary's term of office, but continue in his successors, and the faculties granted to the Bishop are also given to the Vicar General, unless the Bishop (or others to whom the faculties were given) was selected for this honor on account of personal qualities. The name "Ordinary" is applied to diocesan bishops, each for his territory, to Abbots *Nullius,* and to the Vicars-general of both, to Apostolic Vicars and Prefects, and to the Superiors of exempt religious.[12] The successor of the Ordinary to whom a faculty was granted, may complete the execution thereof which the predecessor had begun, *e. g.,* by calling witnesses, issuing summonses, etc.

As to § 3: A faculty, if given, grants the use of all the means necessary for its application, and hence the faculty of dispensing includes the power of absolving from censures, when necessary; but only for the purpose of rendering the subject capable of receiving the dispensation. Therefore, *e. g.,* an excommunication or suspension or personal interdict is, *de facto,* suspended only here and now, whilst conditions added to the censures for the case of real absolution remain.

12 Cfr. can. 198 and the declaration of the Holy Office of Feb. 20, 1888; when the term "*loci*" or "*locorum*" is added, the superiors of exempt orders are not included.

INTERPRETATION OF PRIVILEGES

CAN. 67

Privilegium ex ipsius tenore aestimandum est, nec licet illud extendere aut restringere.

A privilege must be interpreted according to its wording or purport, and must be neither extended nor restricted.

CAN. 68

In dubio privilegia interpretanda sunt ad normam can. 50; sed ea semper adhibenda interpretatio, ut privilegio aucti aliquam ex indulgentia concedentis videantur gratiam consecuti.

In case of doubt privileges must be interpreted in accordance with can. 50, but in such a way that those who have received the privilege always retain some favor from the good will of the grantor.

The interpretation of privileges follows the general rules of interpretation, as stated above, and especially that of rescripts. The principal rule is that the wording or purport (*tenor*) of the text must be duly consulted. Neither an extensive nor a restrictive interpretation of privileges is admissible. Where a doubt exists, the rule given in can. 50 must be applied, but in such a way that some privilege or favor remains.

CAN. 69

Nemo cogitur uti privilegio in sui dumtaxat favorem concesso, nisi alio ex capite exsurgat obligatio.

No one is obliged to make use of a privilege

granted to him solely for his own benefit, unless an obligation to that effect should arise from some other source.

CAN. 70

Privilegium, nisi aliud constet, censendum est perpetuum.

A privilege is perpetual, unless the contrary is evident.

A doubt may arise as to whether a privilege is purely personal, or real, or mixed. Such doubts can be solved by examining the subject-matter and the wording of the privilege. The purpose or scope of a privilege is, as a rule, obvious. If it is not clear whether the successor of a personally privileged Ordinary, *e. g.*, the successor of an abbot, has the use of a certain privilege, the address of the document should be examined. If the name of the grantee appears first, and his dignity second, the privilege must be regarded as merely personal. Where the dignity is mentioned first, the privilege may be taken as real and is consequently transferable to the successor in the same dignity or office, unless the wording of the text excludes this interpretation.[13]

The Code adds, "*nisi alio ex capite exsurgat obligatio,*" thereby no doubt referring to the so-called personal privileges of the clergy which cannot be renounced by the individual. It may also be that the fulfillment of a precept would urge, for instance, hearing Mass in a private oratory,[14] or absolving or dispensing, etc. Unless the contrary is clearly expressed, a privilege lasts for ever.

13 Cfr. Engel, V, 33, n. 4.
14 Laurentius, *Inst. Iuris Eccl.*, 1903, p. 247.

LOSS OF PRIVILEGES

Although its nature would seem to spell perpetuity, a privilege may be lost, either by law, or lapse, or renunciation, or by one's own fault.

CAN. 71

Per legem generalem revocantur privilegia in hoc Codice contenta; ad cetera quod attinet, servetur praescriptum can. 60.

A general law repeals the privileges contained in this Code; otherwise can. 60 concerning the recall of rescripts must be applied.

Formerly a certain class of privileges was called "*clausa in corpore juris*" and sometimes "*privilegia in corpore juris clauso,*" which signified those privileges contained in the Corpus Juris.[15] In like manner the privileges contained in the New Code, *e. g.*, clerical, religious, and real, form a special class, and as such may be abolished by a general law issued by the supreme lawgiver.

CAN. 72

§ 1. Privilegia cessant per renuntiationem a competente Superiore acceptatam.

§ 2. Privilegio in sui tantum favorem constituto quaevis persona privata renuntiare potest.

§ 3. Concesso alicui communitati, dignitati, locove renuntiare privatis personis non licet.

§ 4. Nec ipsi communitati seu coetui integrum est renuntiare privilegio sibi dato per modum legis, vel si

15 The authors, however, did not agree as to what constituted the "Corpus Juris," some admitting only the three authentic collections, others including the Decretum and the Extravagantes.

renuntiatio cedat in ecclesiae aliorumve praeiudicium.

§ 1. Privileges cease by renunciation if the renunciation is accepted by the competent superior.

§ 2. A merely personal privilege may be given up by any private person.

§ 3. A privilege granted to a community, dignity, or place cannot be renounced by private persons.

§ 4. Nor is the community or congregation (society) itself free to renounce a privilege granted by way of law, or if its renunciation should cause a prejudice to the Church or to others.

For a commentary on this point see p. 167, *infra.*

CAN. 73

Resoluto iure concedentis, privilegia non exstinguuntur, nisi data fuerint cum clausula: *ad beneplacitum nostrum,* vel alia aequipollenti.

Privileges are not extinguished even if the grantor goes out of office, unless they contain the clause: *ad beneplacitum nostrum,* or some other clause of like import.

A clause of like import would be, *e. g.,* "*durante pontificatu.*"

CAN. 74

Privilegium personale personam sequitur et cum ipsa exstinguitur.

A personal privilege follows the person to whom it has been granted and expires with that person.

Here a note may be allowed as to the first clause. While it is true that the personal privilege cleaves, as the canonists say, to the bones of the person, the use of such a privilege may be limited or perhaps subject to the consent of another. Thus, *e. g.*, the wearing of the Cappa Magna is granted to some abbots not in virtue of their office, but to the person, and hence is restricted to their own churches.

Can. 75

Privilegia realia cessant per absolutum rei vel loci interitum; privilegia vero localia, si locus intra quinquaginta annos restituatur, reviviscunt.

Real privileges cease upon the complete destruction of the thing or place, whilst local privileges revive if the place is restored within fifty years.

This enactment is of great importance for churches and monasteries, which, though the new proprietors or occupants have no relation whatever with the former, can enjoy their privileges without an act of renewal, if only a record be kept of the time of ruin and restoration. Of course it is understood that the restored places serve the same purpose as before,— the purpose for which, or in view of which, the privilege was given.

Renunciation of a privilege (as dealt with in canon 72, *supra*) is the voluntary giving up of a privilege ac-

quired.[16] This is permissible because, as a rule, everyone is at liberty to relinquish his own rights.[17] However, to be effective, renunciation must be accepted by competent authority. Hence

§ 1 says that privileges cease by renunciation if the latter is accepted by the competent authority, which is none other than the grantor or his legitimate successors.

According to § 2, a merely personal privilege may be surrendered by any private person. The reason is because such privileges are supposed to affect the holder exclusively.

§ 3 declares that a privilege granted to a community, dignity or place cannot be renounced by private persons. It follows that the superior of a community, or a religious, or a clergyman cannot renounce such a privilege, *e. g.*, of exemption or the *privilegium canonis* and *fori*.[18]

§ 4 provides that not even a community or congregation is free to renounce a privilege if it has been granted by way of law, or if its renunciation would cause a prejudice to the Church or to others. A privilege granted by way of law is one contained in the Code, *e. g.*, clerical exemption, immunity. Such a privilege cannot be renounced, even if the community by common consent, or an assembly by general assent or a majority of votes, were ready to give it up. It is also forbidden to renounce a privilege, even though not contained in the Code, if

16 "Resoluto iure concedentes" (rescribentis, ferentis legem) is an expression often occurring in the Code, and is of general purport, including every kind of cessation of office by death, resignation, transfer, exchange, suspension, or deposition.

17 C. 6, X, V, 33.

18 Cfr. c. 12, X, II, 2; c. 36, X, V, 39; c. 5, X, I, 43: "Cum etsi sponte volueris, de jure tamen nequiveris, sine licentia Rom. Pontificis renunciare privilegiis vel indulgentiis libertatis, quae monasterium illud indicant ad jus et proprietatem Rom. Ecclesiae pertinere."

giving it up would result in detriment to the Church or others, *e. g.,* the faculty of binating or absolving from reserved cases. On the other hand, a community or chapter *may* give up such privileges as have become more or less useless or of little importance.[19] A sort of tacit renunciation seems to be what canon 76 calls *non-usus* or contrary usage.

CAN. 76

Per non usum vel per usum contrarium privilegia aliis haud onerosa non cessant; quae vero in aliorum gravamen cedunt, amittuntur, si accedat legitima praescriptio vel tacita renuntiatio.

By non-use or contrary use a privilege which is not injurious to others does not cease; but a privilege that is burdensome to others loses its force by legitimate prescription or tacit renunciation.

It may be useful to recall the distinction between an onerous and a non-onerous privilege. The former causes a burden or damage to others, *e. g.,* collecting tithes or alms, whilst the privilege of eating flesh-meat on certain days cannot be called injurious to others (except perhaps to the cook or the treasury).

There is also a difference between *prescription* and *tacit renunciation.* Prescription means a certain space of time, say forty years, during which the privilege has not been made use of, although there was occasion for using it. *Tacit renunciation* means that one has knowingly and willingly performed an act contrary to the privi-

[19] Cfr. c. 8, X, I, 2 de const.

lege, either negatively by not using the privilege when one should have used it, or positively, by doing the contrary to that which the privilege entitled one to.[20] The canon says that only onerous privileges, namely, such as follow the *jus patronatus* or right of presentation, cease by non-use or contrary use.[21]

CAN. 77

Cessat quoque privilegium, si temporis progressu rerum adiuncta sic, iudicio Superioris, immutentur ut noxium evaserit, aut eius usus illicitus fiat; item elapso tempore vel expleto numero casuum pro quibus privilegium fuit concessum, firmo praescripto can. 207, § 2.

A privilege also ceases if in course of time conditions change to such a degree that, in the judgment of the superior, the privilege becomes harmful or its use illicit; or if the time for which the privilege has been granted expires, or the number of cases for which it was given is full; without detriment, however, to canon 207, § 2.

This canon states what is self-evident under regula juris 61 in 6°: "quod ob gratiam alicuius conceditur, non est in eius dispendium retorquendum." In can. 207, § 2, the *forum internum* is excepted from the rule here laid down.

CAN. 78

Qui abutitur potestate sibi ex privilegio permissa,

20 Cf. Reiffenstuel, V, 33, nn. 201 ff.

21 Cf. c. 6, X, V, 33: "De privilegio tamen indulto tanto tempore vobis detrahere voluistis." The length of time is not expressed, but forty years may safely be assumed.

privilegio ipso privari meretur; et Ordinarius Sanctam Sedem monere ne omittat, si quis privilegio ab eadem concesso graviter abutatur.

Whoever abuses the power granted to him by a privilege, deserves to be deprived of the privilege itself; and the Ordinary shall not fail to notify the Apostolic See if anyone grievously abuses a privilege granted to him by the same.

The wording of this canon leaves no doubt that abuse does not, *eo ipso,* annul a privilege, but only after a sentence issued by the Apostolic See.[22] By the name of "Ordinary" is meant not only the diocesan Ordinary and his Vicar General, but the superior of exempt religious. On the other hand, it is also true that certain crimes are stated and singled out in the law itself as attended by the loss of certain privileges, *e. g.,* if one commits a crime in a church, presuming on immunity, or fails to wear the clerical dress, of which more *loco suo.*

The last canon on privileges treats of privileges granted *vivae vocis oraculo, i. e.,* by word of mouth.

Can. 79

Quamvis privilegia, oretenus a Sancta Sede obtenta, ipsi petenti in foro conscientiae suffragentur, nemo tamen potest cuiusvis privilegii usum adversus quemquam in foro externo vindicare, nisi privilegium ipsum sibi concessum esse legitime evincat.

Although privileges orally granted by the Holy See, may be used by the grantee in the internal

22 Cf. c. 7, Dist. 74 (Greg. M.); c. 24, X, V, 33; the abuse may touch upon time or place or persons exceeding the limits thereof.

court of conscience, no one should claim their use against another *in foro externo,* unless he can prove that the privilege was legitimately obtained.

For example, I know of a religious who received from Pius X, of happy memory, the privilege of reciting the Breviary, when traveling, according to the rubrics used at S. Anselmo. This privilege was given orally, and consequently touches the conscience rather than the *forum externum.* A privilege for the *forum externum* (*e. g.,* one granted to an order against the jurisdiction of the Ordinary) requires proof. Hither belong the Constitution "Romanus Pontifex," of Gregory XV, of July 2, 1622, and that of Urban VIII, "Alias," of December 20, 1631, which abrogated all *vivae vocis oracula* both *in foro interno* and *externo,* except those obtained by the petitions of sovereigns and cardinals. The new Code admits the existence and use of orally given privileges, as long as conscience alone is concerned; but in justiciable cases such a privilege cannot be alleged, unless proven by witnesses. What witnesses are required? The Code does not specify, but we believe that the testimony of the cardinal-protector of a religious order, or any other cardinal, would be sufficient proof of the privilege having been granted by the Holy See.[23] (Can. 239, § 1, 17.)

In order to complete the subject of privileges, we may be permitted to add a few words on a topic which the Code does not explicitly treat, namely, the *confirmation* or *ratification* of privileges. A privilege may be ratified *in forma communi* or *in forma specifica. Confirmatio in*

23 Cfr. Reiffenstuel, V, 33, nn. 149 ff.

forma communi leaves the value and effect of a privilege *in statu quo,* without determining whether the privilege is valid or invalid, and hence adds no juridical force either to the first or second grant. *Confirmatio in forma specifica* is given after mature consideration of the privilege in case, and is executed either by verbal insertion of the former privilege or by using the clausulae: "*ac si de verbo ad verbum inserta fuissent,*" or "*ex certa scientia.*" In this latter case the confirmation gives juridical value to the privilege and is tantamount to a new valid concession; and the new grantee enjoys the privilege, even if the former should lose it.

Note, also, that privileges are sometimes granted especially by way of communication, or ratified with the clausula "*dummodo*" or "*quatenus sunt in usu.*" This means that the grantor does not wish to ratify or grant anew by corroboration a privilege which has been lost by non-use or contrary usage, or for another reason.

TITLE VI

ON DISPENSATIONS

It is natural that a society spread over the whole globe and comprising members of the most diverse types living in different climes and under various conditions cannot apply the law with equal rigor at all times and in all circumstances. Even in the first four centuries of her existence the Church was compelled to mitigate the strictness of her penitential discipline. This is briefly and appropriately expressed by Abbo of Fleury (died 1004): "We must take into consideration the situation of countries, the character of the times, the frailty of men, and other reasons which of necessity change the laws of different provinces. The same is true concerning papal decress, which are of such authority that many judges expect the verdict of the Roman Pontiff. In these things, therefore, utility and equity (*utilitas et honestas*) must prevail, but not the enticing enjoyment of desires." [1] The same idea recurs in the prologue to the *Decretum* of Yvo of Chartres (died 1115). He, too, reduces the reasons for granting dispensations to two — utility and necessity, and compares the Church to a crew who throw merchandise over board in order to save the ship.[2] Gratian did not go further, for all his texts are taken from Yvo.[3]

1 *Collectio Canonum,* c. VIII (Migne, 139, 483), which is untouched by Pseudo-Isidorian influences.

2 *Proleg. in Decretum* (Migne, 161, 47 ff.).

3 Cfr. c. 56, Dist. 50; c. 41, C. 1, q. 1; c. 16, C. 1, q. 7.

That with the outward growth of the papacy the power of papal dispensation also increased, goes without saying. Hence it cannot surprise us that Innocent III (1198–1216) said that "the fullness of power confers the right of dispensation."[4] Some bishops and provincial synods also exercised the right of dispensation, although in a limited way. Before Gratian's time, this power touched an accomplished fact rather than something to be done in future, although even this latter species of dispensation (*super faciendum*) was not entirely unknown. Dispensation came to comprise cases of simony, celibacy (especially the *filii presbyterorum*), irregularities, vows, and above all matrimonial cases.[5] The Council of Trent enacted into law what Abbo and Yvo had taught,— that a dispensation should be granted only for urgent and just reasons, for the greater utility of the faithful, and after previous deliberation and cognizance of the case.[6] We shall now see what the new Code has to say on the subject.

CAN. 80

Dispensatio, seu legis in casu speciali relaxatio, concedi potest a conditore legis, ab eius successore vel Superiore, nec non ab illo cui iidem facultatem dispensandi concesserint.

A dispensation, *i. e.*, a relaxation of the law in a particular case, may be granted by the lawgiver, his successor or superior, and by those to whom the faculty of dispensing has been delegated.

There is a distinction between *epikeia,* so-called, or

4 Cf. c. 4, X, III, 8.

5 Cf. Stiegler, *Dispensation, Dispensationswesen und Dispensationsrecht im Kirchenrecht*, 1901, Vol. I (only one).

6 Trid., Sess. 25, c. 18 de ref.

benign interpretation, which is related to equity, and a dispensation; for the latter is an act of jurisdiction flowing from the legislative and judiciary power, whilst the former is nothing more than either an interpretation or an excuse based on private judgment. Hence a dispensation presupposes legislative power, nay is, so to speak, coextensive with it. Therefore the *Pope* can dispense in all matters subject to his legislation, that is to say, in ecclesiastical, but not in divine laws.[7] The same power is vested in his *successor,* because he is his equal, and "*par in parem non habet imperium.*" But the Pope can also dispense from episcopal laws, for he is superior to the bishops. On the other hand a *bishop* may dispense from papal laws if he has received the necessary faculties from the Apostolic See. The same right belongs to *superiors* of exempt religious orders.

The Pope is not bound by the existence or validity of reasons, but can dispense validly without reason, although it is not to be presumed that he would proceed thus, since a dispensation is a sore on the law and should not be used for destruction. This is not the case with those inferior to the Pope, hence canon 81 establishes the power of those *inferior* to the *Roman Pontiff.*

Can. 81

A generalibus Ecclesiae legibus Ordinarii infra Romanum Pontificem dispensare nequeunt, ne in casu quidem peculiari, nisi haec potestas eisdem fuerit explicite vel implicite concessa, aut nisi difficilis sit recursus ad Sanctam Sedem et simul in mora sit pericu-

7 A difficulty might arise from vows and the *matrimonium ratum;* but in such laws, the obliging force of which depends on the free will of man, the Pontiff can, in virtue of his vicarious power, render the obligation ineffective. (Cfr. Wernz, *l. c.,* I, n. 122.)

lum gravis damni, et de dispensatione agatur quae a Sede Apostolica concedi solet.

Ordinaries inferior to the Pope cannot dispense from the general laws of the Church, not even in a particular case, unless they have received that power either explicitly or implicitly, or in cases in which recourse to the Holy See is difficult and there is at the same time grave danger in delay, and the dispensation requested is one which the Holy See is wont to grant.

Two sources for dispensing, therefore, are open to the Ordinaries, either a communicated power or the nature of the case requiring dispensation. Power is given *explicitly* in writing or orally or by any means conveying it expressly. Thus faculties are granted, and the law itself (the Code) grants this power, for instance in can. 990, 1245, 1402, to the Ordinaries (according to can. 198). *Implicitly* a power is conferred when a power, granted explicitly either by law or indult, involves another one, though not expressly mentioned in the grant. Thus can. 1051 permits the local Ordinaries to dispense from certain impediments, and by this one explicit power the right of legitimating the offspring (except adulterous and sacrilegious) is conferred.

The class of cases mentioned in the second part of our canon may also be said to afford an *ordinary reason* for which those inferior to the Pope can dispense from the common law.

Three conditions must concur to make a dispensation valid[9] and licit: recourse to the Holy See must be dif-

8 Michiels, l. c. II, 482 ff.

9 The canon simply says "nequeunt," which might be restricted to licitness; yet because dispensa-

ficult, there must be danger of grave damage, and the case must be subject to dispensation. The concurrence of these conditions may especially be verified in matrimonial cases, but also in irregularities arising from a hidden defect or crime. By *recourse to the Holy See* is here understood ordinary recourse, *i. e.,* by mail, not by telegraph, which is an extraordinary means of communication. A *grave danger* is present when escape is almost, not entirely, impossible, and hence it is not necessary that it be a *casus fortuitus,* or unforeseen incident.[10] How grave the danger must be, cannot be determined by a general rule; but scandal or injury of reputation would suffice to constitute a serious danger. Finally, the case must be one from which the *Holy See* is wont *to dispense,* for nothing is included in the general concession which the superior is not likely to grant.[11] Hence, whatever is rare, extraordinary, unusual, or difficult to obtain from the Holy See, does not come within the sphere of episcopal power, for instance, irregularities *in defectu corporis enormi.* This is the viewpoint which the Ordinaries — and religious superiors also, for the canon does not add "*loci*" or "*locorum*" — must take in relation to the common law as contained in the Code.

The next canon deals with the power of Ordinaries regarding *diocesan laws* and laws *of provincial councils.*

CAN. 82

Episcopi aliique locorum Ordinarii dispensare valent

tions must be strictly interpreted, and because "negatio plus tollit quam affirmatio ponit," we believe that the interpretation given above is correct.

10 Barbosa, *Tractatus Varii,* p. 278, p. 108.

11 Regula juris in 6°; Reiffenstuel, *Comment in Reg. Iuris;* Putzer, *l. c.,* p. 36 f., enumerates still other cases, but with the exception of *dubium juris or facti* (cfr. can. 15) these cannot now be admitted, because the Code is silent about them.

in legibus dioecesanis, et in legibus Concilii provincialis ac plenarii ad normam can. 291, § 2, non vero in legibus quas speciatim tulerit Romanus Pontifex pro illo peculiari territorio, nisi ad normam can. 81.

Bishops and other diocesan Ordinaries can dispense from diocesan laws and from the laws of provincial and plenary councils, according to the rule contained in canon 291, § 2, but not from laws specially given by the Roman Pontiff for that territory, except in conformity with canon 81.

There is a gradation in this canon as to the power of dispensing. Bishops can dispense from their own (diocesan) laws with or without reason, for of their own laws they are the lawgivers in the proper sense. The second class of laws referred to comprises those of provincial or plenary councils whose decrees are supposed, according to canon 291, to be recognized by the Holy See. From these the *Ordinarii locorum* cannot licitly dispense except in particular cases and for just reasons. Now a particular case is one which occurs less frequently, and, generally speaking, touches single persons or parishes. For to dispense a whole diocese or province, if it should happen at stated or frequent intervals, would be a general not a particular dispensation. Thus to dispense the whole clergy would also be a general dispensation. Finally, the canon adds that the Ordinaries cannot dispense from particular laws given by the Holy See for that particular territory; for instance, from the law governing the nomination of candidates for vacant sees in the United States (S. C. Cons., July 25, 1916), or, perhaps,

from the law regarding holy-days. The clause, however, permits dispensation in accordance with canon 81.

Descending in the scale of the hierarchy the Code says:

Can. 83

Parochi nec a lege generali nec a lege peculiari dispensare valent, nisi haec potestas expresse eisdem concessa sit.

Parish priests can dispense neither from a general nor from a particular law, unless they have expressly received that power.

This text states an obvious truth, and at the same time deals a blow to a certain tendency which permitted *parochi ex consuetudine* to dispense in several cases.[12] For the law requires an explicit communication of that power. If parish priests need a dispensation from a general law, as embodied in our Code, the faculty must come from the Pope, either directly or indirectly through the Ordinary; if a particular law is to be dispensed from, a distinction must be made. If the law in question has been enacted by a plenary council, the habitual faculty of dispensing therefrom must be obtained from the Pope, either immediately or mediately, as in the case of the general law. For single cases, we believe, the bishops can without special faculties communicate the power of dispensing to their parish priests, for they have received this power by law (can. 291), and not from man. To dispense from merely diocesan laws depends exclusively on the bishop, who may therefore grant that faculty, either habitually or *ad certum numerum casuum,* to parish

12 Cfr. Putzer, *l. c.*, p. 36, as to dispensations from fast and abstinence; servile work prohibited; see can. 1245.

priests. However, it must be done expressly, either orally or in writing, and must not be presumed, for a presumption is no express concession.

After having determined the persons who may exercise the power of dispensation, the Code emphatically reinforces the Tridentine decree concerning the causes of dispensation:

CAN. 84

§ 1. A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione gravitatis legis a qua dispensatur; alias dispensatio ab inferiore data illicita et invalida est.

§ 2. Dispensatio in dubio de sufficientia causae licite petitur et potest licite et valide concedi.

§ 1. No dispensation from an ecclesiastical law is to be granted without a just and reasonable cause, and due regard must always be had to the importance of the law from which the dispensation is given; otherwise the dispensation given by an inferior is illicit and invalid.

§ 2. When there is doubt as to the sufficiency of the cause, a dispensation may be lawfully asked for, and licitly and validly granted.

The *cause* may be the motive or impelling reason, the former being the *raison d'être* of the dispensation, the latter only an aid, or, as the Scholastics express it: the motive cause is "*ad esse simpliciter*," the impelling cause, "*ad facilius esse*." Here the *causa* must be understood as the *motive* cause.[13]

13 If one reason is insufficient, two reasons perhaps convince: "rationes duae vincunt unam." Barbosa, *Tractatus Varii*, Axioma 197, *l. c.*, p. 130.

Concerning the *time* when the *causa* must be verified, we refer to Can. 41 *de rescriptis:* If no executor is appointed, the cause must exist at the time of granting the dispensation; if an executor handles the dispensation, the cause must be verified at the moment of his signature.

As to the *nature* of the cause, the Code says that it must be *just and reasonable.* Justice refers to law, which admits certain causes and rejects others. Thus a list of canonical causes is set up, *e. g.,* for matrimonial dispensations. The cause must be reasonable because, as law pertains to reason, so also must a dispensation partake of reason. The judgment as to the latter quality lies with the grantor.

Furthermore there must be a *proportion* between the seriousness or importance of the law and the dispensation, which is a *vulnus legis.* Hence for relaxing a serious law a serious and solid reason must be advanced; a graver cause is required to dispense from a major impediment than from a minor.[14]

Besides, it is but just that the persons should be considered for whom a dispensation is issued, because influential persons are more important for the public welfare than ordinary mortals.[15]

Lastly, the *circumstances* must be considered, not only of persons, but also of consequences which might probably follow, *e. g.,* scandal, damage, injury, etc. If the reason alleged is not just and reasonable, the dispensation granted by an inferior is illicit and invalid. Notice that the canon does not say, as the Tridentine Decree did (Sess. 25, c. 18) that it is subreptitious; hence there can be no longer any doubt as to the view taken by the Church. Therefore, if, after the application of a dis-

14 Cfr. can. 1042 f. 15 Cfr. Putzer, *l. c.,* p. 76 f.

pensation, the alleged cause is found to be without foundation, the dispensation is null and void (with the exception of can. 1054).

§ 2 mitigates the apparent harshness of § 1, inasmuch as it declares that, if the sufficiency of the reason alleged is doubtful, the dispensation holds.

The next canon treats of the *interpretation* of dispensations.

CAN. 85

Strictae subest interpretationi non solum dispensatio ad normam can. 50, sed ipsamet facultas dispensandi ad certum casum concessa.

Dispensations must be strictly interpreted, according to canon 50; also the faculty of dispensing granted for a certain case is subject to strict interpretation.

In order not to repeat what has been said before, we only remind the reader of the rule that dispensations must never be extended to cases and persons not comprised in the faculties, as will be further explained in matrimonial cases. But other dispensations, too, *e. g.* from vows, must be strictly interpreted; thus the power of dispensing from vows does not include that of dispensing from oaths. Besides, the *clausulae* and the *stylus Curiae* must be closely observed.[16] Canon 85 further mentions dispensations granted *ad certum casum*. Here, *a fortiori,* extension of restriction is inadmissible, because no argument from *dispositio similis* can be drawn, *e. g.,* if one receives the faculty to dispense a certain person, this cannot be applied to another, although he or she be similarly situated.

16 Cf. Putzer, *l. c.*, p. 12 f., p. 165 f.

The term "*facultas*" must be strictly interpreted in a determined case, for the general supposition is that there are personal qualities, as well as a mandate implied, which are subject to strict interpretation. The last canon treats of the *cessation* of dispensations.

CAN. 86

Dispensatio quae tractum habet successivum, cessat iisdem modis quibus privilegium, nec non certa ac totali cessatione causae motivae.

A dispensation which permits of successive application ceases the same way as privileges, and with the certain and complete cessation of the motive cause.

What has been said concerning the manner in which privileges cease, must be applied here also, because habitual faculties are numbered among the *privileges beyond the law* (can. 66, § 1), and hence cease by renunciation, repeal, or the death of the grantor, if there is a clause that says so, otherwise not. To ask whether a dispensation can be lost by contrary usage and prescription seems, at first sight at least, silly. Yet a dispensation which permits of successive application (*tractum successivum*), *e. g.*, eating flesh-meat, saying a "black Mass," etc., is not exhausted by one act and may therefore be forfeited, if contrary usage and an imperative act of the superior combine. Since the Code says that such dispensations lose their force in the same way as privileges, we must apply that disposition of the law also to the case in hand.

Finally, the Code provides that if the motive cause ceases entirely and for certain, the dispensation also ceases. The two conditions ("entirely and for cer-

tain") must be taken conjointly. For instance, if one has received a dispensation from the vow of chastity *ad usum matrimonii* on account of temptations, he may continue the use of marriage even after the cessation of these temptations, because there is no certainty. But if one has obtained a dispensation from reciting the Breviary on account of weak eyes, he cannot continue the use of the dispensation after his eyesight has been completely restored. Taking into consideration can. 85, regarding a faculty given for a determined case, the dispensation last mentioned must be held to be exhausted after application, and is therefore *negotium finitum.* For it is generally supposed that in such a case the faculty was given in *forma mandati,* which expires after application and admits of no extension or *epikeia.*

APPENDIX I

THE IUS PUBLICUM ECCLESIASTICUM

INTRODUCTION

Several friends have expressed the desire for an outline in our Commentary of what is generally called the *Ius Publicum Ecclesiasticum* or the fundamental features of the Church as a "corporation." This desire seemed reasonable. True, the question has been slightly touched at the beginning of Volume II. Still it is but a mere sketch or *adumbratio,* which we considered insufficient, inasmuch as the subject required more attention. For this reason the following topics have been added.

If the place does not appear suitable or appropriate (for this treatise should rather appear at the beginning of the Volume) it must be remembered that the author had to reckon with the difficulties of modern bookmaking. Stereotyped plates allow only limited changes in the text, though additions at the end can be readily made. For the rest, we hope the reader will appreciate our good will to offer him as much as possible in the space allotted and pardon the inconvenience of this arrangement. For further information on the topic to be treated we may be permitted to refer the reader to the following works:

BACHOFEN, *Summa Iuris Ecclesiastici Publici,* Romae, 1910.

CAVAGNIS, *Institutiones Iuris Ecclesiastici Publici,* Romae, 1882.

SOGLIA, *Institutiones Iuris Publici Ecclesiastici,* Paris (no date).

Solieri, *Iuris Publici Ecclesiastici Elementa,* Romae, 1900.

Tarquini, *Iuris Ecclesiastici Publici Institutiones,* ed. 13, 1890.

On several topics the reader may also consult the text-books of the so-called *Theologia Fundamentalis or Apologetics,* for instance, Mazella, *De Religione et Ecclesia,* Romae, 1894; Tanquery, *Synopsis Theol. Dogmaticae Fundamentalis,* 1900, etc., etc.

CHAPTER I

THE CONSTITUTION OF THE CHURCH

The Code, in can. 100, vindicates to the *Catholic Church and to the Apostolic See the character of a juridical person by divine right.* This leads to the consideration of the Church as a *perfect society,* or, as we may call it, the constitution of the Church, provided the term is rightly understood. For it is quite true, as Dr. Brownson observes,[1] that there is an organic and a written constitution. What this writer says of our American Constitution may, with some changes, be applied to the Catholic Church.

"The Constitution is the living soul of the nation, that by virtue of which it is a nation, and is able to live a national life, and perform national functions." This he calls the organic or the nation's Constitution, to distinguish it from the written or government's constitution, as it was framed by the authors of our famous national document.

Now, the constitution of the Church, in the organic sense, is nothing else than the charter of her Divine Founder, Jesus Christ, who established the Church as the embodiment and continuation of His own mission. Hence the Church is designated as the Body of Christ, the Kingdom of God, the House of God.[2] Hither

1 See *The Works of Orestes A. Brownson,* collected and arranged by Henry E. Brownson, Detroit, 1904, Vol. XV, p. 561.

2 I Cor. 12, 12; Eph. 2, 16; 5, 23; Rom. 12, 4 ff.; Matth. 16, 18 ff., *et passim;* Is. 2, 2; I Tim. 3, 15, etc.

should also be referred the pragmatic parables on the sower, the field, the mustard seed, the leaven, the fishermen's net.[3] All these sayings, figures, types, and parables depict the Church of Christ as a living organism, a compact body and a permanent union of man with a set purpose and the proper means to attain it. No doubt, they also insinuate a characteristic and peculiarly constituted organization. For the spiritual or religious feature is so prominent that sometimes the juridical character appears to be relegated to the background.

Yet it is undeniable that the Church has a strictly juridical setting. To prove this we only have to analyze the elements that make up any perfect society. A *perfect* society is one which is autonomous or sovereign, has a specified and complete end, and is endowed with the means necessary to accomplish its purpose.

1. *Autonomy* spells independence or sovereignty. In every independent society there must be some authority, from which the whole law and administration ultimately proceed.[4] This authority must be unhampered and untrammelled by any other superior authority of the same kind in the exercise of its power towards other societies as well as individual members. This we may call public and private independence or sovereignty. This is clearly embodied in the primacy of St. Peter, to whom the keys of heaven and earth were given separately and distinctly from, but not in opposition to, the other apostles.[5]

This *primacy* evidently is one of power, of jurisdiction, of supreme administration, not a merely honorary prerogative. For its purpose is to loose and bind, to build and keep together the body of Christ, to sustain

3 Matth. 13; see Funck, *The Parables of the Gospel*, tr. by E. Leahy., Pustet, 1915.

4 Hinsdale, *The American Government, National and State*, ed. IV p. 14.

5 Matth. 16, 18 f.; 18, 18; Luke 22, 31 f.; John 21, 15–17.

the unity of faith and charity, a work of ministry, functions which manifestly require authority.[6] This sovereignty was strictly *independent* of any other power then known or exercised. Neither the synagogue nor the sanhedrin, nor the Roman Empire conferred one particle of this power, nor ventured to curtail the rights of divine authority. St. Peter told men plainly to judge whether it be just, in the sight of God, to hear men rather than God.[7] The Church was the work, not of men, but of God, as Gamaliel wisely understood.[8] We need not recount the attitude of the Roman Empire towards the "*odium generis humani.*"[9]

Lastly this sovereignty was intended not as a personal gift to St. Peter to vanish when he died. On the contrary, it was to last, to be a *permanent institution,* to endure as long as there was a soul to be saved, as long as mankind stood in need of salvation. For if the Church truly means a continuation of the Incarnation and of Christ's mission, her mission cannot rest on a merely historical personage, or a recollection of past events. Men are not kept together and prodded in the prosecution of a definite purpose merely by memories of the past. This would be a miracle less intelligible than the perpetuity of the primacy. Hence it is that St. Peter left behind him a successor, endowed with the same juridical power as he himself had possessed. This, as history proves,[10] was transferred to his *successor in the Roman See;* in other words, to the *Roman Pontiff as successor of St. Peter.* He holds the primacy of jurisdiction over and in the universal Church.

6 Eph. 4, 11 ff.
7 Acts 4, 19.
8 Acts 5, 38 f.
9 Tacitus, *Annal.,* XV, 44.
10 See H. Grisar, S. J., *Storia di Roma e dei Papi nel Medio Evo,* trad. Mercati, 1908. Vol. I, p. 234 ff.; Th. Allies, *The Throne of the Fisherman Built by the Carpenter's Son,* London, 1887; Idem, *The Holy See and the Wandering of the Nations,* London, 1888.

But what about the successors of the other Apostles, the *bishops?* Can. 329 says: The bishops are the successors of the Apostles and, by divine institution, are placed over the individual churches which they govern with ordinary power under the authority of the Roman Pontiff. This, it seems to us, means that the episcopate is established by Christ, that its power of order and jurisdiction rests on divine law, but as to its exercise depends on the authority of the Roman Pontiff. For the unity of the Church indeed requires a supreme government, but it is also obliged to recognize the divinely established rights of the bishops.

Thus we dare say with a prominent writer: "If the constitution of the Church is essentially papal, it is also essentially episcopal." This is clearly expressed in the canon quoted above: "*Episcopi ex divina institutione peculiaribus ecclesiis praeficiuntur.*" The text may indeed be taken in the sense of those authors [11] who maintain that the whole episcopal jurisdiction is derived from the Pope. However, if divine law requires their being set over individual churches, this act involves jurisdiction, or, as St. Paul says, the power to rule the Church of God.[12] The Pope indeed may take away this power from individuals or circumscribe it, but he cannot abolish it entirely, so that he would rule the Church, as it were, through vicars or commissaries. St. Cyprian has expressed the relation of the episcopal to the papal power in one sentence: The episcopate is one, of which each holds his part *in solidum.*[13]

Essential also to ecclesiastical autonomy is the *distinction of the different ministers,* as they are distinguished

11 See J. B. Andries, *Alph. Salmeronis Doctrina de Iurisdictionis Episcopalis Origine et Ratione,* Moguntiae, 1871; Mazzella, l. c., p. 786 f.

12 Acts 20, 28.

13 *Opp. S. Cypr., ed. Hartel,* 1868, p. 214.

in the hierarchy (can. 108). *Essential,* finally, is the *difference between clergy and laity,* as stated in can. 107.

2. The next element necessary to any society is *the specified end* for which it is instituted. For societies are distinguished by the purpose they pursue. Hence the Church must possess an end which essentially differs from that of the State. This end for which the Church was founded, was announced by the forerunner of the Lord: It is the *kingdom of heaven,* begun on earth and to be fully realized in the world beyond.[14] This kingdom, in this world, yet not of the world, was to embrace all nations, the wall of separation between Jews and Gentiles having been pulled down by Christ, who died for all.[15] As the mission of Christ embraced all mankind, so it was also intended for all times and is, therefore, *indefectible.*

This purpose, in turn, requires a *visible* society, open to all, known to all, discernible to all. It is futile to distinguish between a visible and an invisible Church. For the very notion of a corporation absolutely requires visibility. A corporation is founded on a unity of members, it needs a unity of thought and will, it must possess an official organ through which the thought and will are to be expressed and executed. All this spells visible activity. For men are not angels who can communicate their thoughts to one another by secret signs. The authority of the Church indeed is invisible; for it is the authority of Christ, who is its invisible Head; but the organs through which this authority speaks are visible.[16] The Pope, though sitting in the Vatican palace, is not invisible, nor are the ministers, or the sacraments, or the worship, or the temples invisible.

14 Matth. 3, 2; 4, 17.

15 Matth. 28, 19; Mark 16, 15; Luke 19, 10; John 10, 10; 18, 36; I Tim. 2, 4.

16 *Brownson's Works,* Vol. IV, p. 568 ff.

We need not add that the O. T. types of the Church: house, ark, field, body, etc., all imply visibility. The whole organism, in fact, is visible: its hierarchical constitution, its symbols of faith, its liturgical setting.

3. The same is true of the *means* appropriate and accommodated to this end. This is clearly expressed by the fact that authority or sovereignty is vested in a visible head, under whose direction the ruling, teaching, sanctifying staff of ministers act. All rule and govern in the name or under the supervision of the Sovereign Pontiff, who acts in the name of Christ, whose vicar He is. All teach in the name of the One who sent and sends them.[17] All administer the Sacraments and sacramentals as ministers of Christ and dispensers of the mysteries of God.[18] These are the means which correspond to the spiritual end of the Church. They comprise all that goes by the terms: *imperium, magisterium, ministerium* of the Church.

To sum up: The Church is a perfect society, whose *autonomy* or sovereignty is vested in the Roman Pontiff, under whose authority the bishops enjoy a divinely established power. The *end* of the Church is spiritual, supernatural, religious, *viz.,* the realization of the Kingdom of God, though in a visible way. The *means* are proportionate to the end,—the visible government, the infallible teaching office, the sacred ministry, which convey truth and grace.

The *qualities* of the Church founded by Christ are:

1) Its *spiritual* or religious or supernatural feature embodied in its end or purpose;

2) *Inequality,* which is apparent in the two great bodies that make up the Church, the clergy and laity, and among the clergy the higher and lower degrees of the hierarchical order;

17 Rom. 10, 15; Eph. 4, 5–14. 18 I Cor. 4, 1.

3) Its *legal existence,* as a corporation which has the inherent and independent right to exist and propagate itself without trespassing upon the rights of the State.[19] For the Church is an institution which is *necessary* for the salvation of each and every individual, at least as the ordinary means of attaining to the Kingdom of God.

If God proposed and set up this legal form of membership in His Kingdom, He could not order or permit legal interference from any other society or authority, which after all must ultimately also proceed from Him. Any clash, therefore, between Church and State as to legal existence and propagation, must be looked upon as contrary to the plan of Providence.

4) Its *marks,* which are decisive and at the same time necessary to vindicate the true and genuine character of the Church. Among the four well known marks, the *unity* of faith and government and *catholicity* are the most conspicuous as far as the juridical aspect is concerned; whilst *sanctity* and *apostolicity* point more to the internal and moral, to the historical and traditional character of the Catholic Church.

These are a few glimpses of the *Magna Charta* of the Church, whose written constitution may now briefly be outlined.

19 See can. 1322, § 2.

CHAPTER II

THE GOVERNMENT OF THE CHURCH

The object of the Church is the realization of the Kingdom of God, under whose government, as the Creator and Ruler of the universe, the society of Christ must visibly lead its members to their appointed end. For, as St. Thomas says, to govern is to direct that which is governed to its proper end.[1] The essence of government is a moral but also a juridical force, in virtue of which those subject to the respective government are obliged to obey and execute the will of the governor. Every power is from God,[2] and those who share in the exercise of power are instruments in the hands of God and His executors. This power is vested in the Church, more concretely in the Roman Pontiff and in the bishops who depend on him.

It has become almost a dogma of the theological as well as juridical school to divide this power into legislative, judiciary, and coercive. This may be accepted in a certain sense, *viz.*, in that of mere distribution, not separation or complete distinction, as Montesquieu wished to apply it to civil government.[3] For separation would involve a splitting up of authority, which is one and indivisible, and therefore cannot be divided. The very supposition of a divided sovereignty implies two sovereign

1 *De Regimine Principum*, I, c. 14, ed. Mich. de Maria, S. J. (*Selecta opp.*, II, p. 31), who vindicates this work to St. Thomas); Brownson, *opp. cit.*, Vol. 15, 303 f.

2 Rom. 13, 1.

3 Holtzendorff's *Encyl. für Rechtswissenschaft, ed. 2*, II, 475.

authorities, which is impossble. Yet the sovereign authority may delegate or, let us rather say, assign certain powers to one government and certain other powers to another.[4] In this sense the triple division mentioned above is permissible.

Does the Code insinuate such a division? We dare say that it does. The *legislative power* is clearly expressed in can. 196, where it is styled the power of jurisdiction or government. The *judiciary power,* proper and exclusive, is vindicated to the Church in can. 1553, which also describes its limits. Can. 2204 claims for the Church the inherent, proper, and independent right to coerce delinquent members, or, in other words, the *coercive power.*

It is safe to call the *Code of Canon Law the written Constitution of the Church.* For although not every detail as to papal and episcopal power is explicitly set forth therein, yet the essentials, and also many detailed features are defined there, so that, with the help of interpretation, the government of the Church may be construed and outlined in every respect. Hence we refer the reader to the canons which define the respective powers. Here a few remarks may suffice.

1. The *legislative power* is nothing else but the right of a society to impose laws so as to oblige the members in conscience, *modo obligatorio,* as far as the end of the society requires it.[5] That such a power should exist in the Church of Christ, which is a perfect society, is evident, and rests on sound philosophy. For every power, being from God, is related to the Governor of the world as a means to an end, which is the direction of man to his ultimate goal. As man, then, is bound to strive and attain to his last end, it is plain that the end proposed by the

4 Hinsdale, *l. c.,* p. 14.

5 Thom., II—II, q. 90, art. 1 ad 3; Tarquini, *l. c.,* p. 8 f.

Church obliges its members to embrace the means necessary for this end.

If this obligation rests on man, the right or power to demand of its members whatever is conducive to the pursuit of this end cannot be denied to the Church. For a multitude of individuals possessed of passions and inclined to selfishness and personal interests cannot be directed to a set purpose without a power dictating the means to be employed. It is in this moral-juridical force that the legislative power consists. For a law is nothing else but an ordinance pertaining to reason and the common welfare, promulgated by the one who has charge of the community.[6] Whether a law be *prohibitive, i. e.,* whether it forbids something, or *positive, i. e.,* demanding or prescribing something, is immaterial. We need not dwell on the *historical facts* which prove the existence and exercise of this legislative power by the Church, and in particular by the Roman Pontiffs. The Acts of the Apostles (ch. xv), as well as the Epistles of SS. Peter and Paul, clearly contain many enactments, some of which, though purely temporary, bear the earmarks of real power. The synodal and conciliar canons are certainly emanations of legislative authority. Lastly, the letters of the Roman Pontiffs, *e. g.,* of Cornelius to St. Cyprian, of Siricius, of Innocent I, Zosimus, Xystus III, Leo I, etc., contain so many rules of ecclesiastical discipline as well as doctrine that it is quite true, as Xystus III says, that the Apostolic See never wearied or ceased to exercise the Apostolic solicitude for all the churches, even if matters had already been settled.[7] If it were necessary to point out some matters that fall under the legislative power of the Church, it might again be safely said that our Code

[6] S. Thom., *l. c.*, art. 4.

[7] Coustant, *Epistolae Romanorum Pontificum*, 1721, coll. 139, 637, 792, 970, 1235.

contains the whole range of her legislative power and therefore it appears useless to single out, under certain headings, what belongs to the *imperium,* what to the *magisterium,* and what to the *ministerium* of the Church. For even rules on ecclesiastical trials and the penal laws, as far as they embody the forms of procedure and application, proceed from the legislative power of the Church. Therefore, in the course of our Commentary, some historical notes have been affixed to the more important points, *e. g.,* on the conciliary theory, the *placet,* etc.

2. The *judiciary power* consists in the proper application of the means conducive to the end of a society, as proposed by the legislative power. Hence the functions of this power are interpretation and decision. *Interpretation* is required to ascertain the true sense of the law, because its wording may not be as plain as one would like to have it, and therefore may leave room for misgivings and different opinions. *Decisions* are called for by litigant parties, or by the actions of the members, whether they were or were not conformable to the law.[8] It goes without saying that the more perfect laws, *i. e.,* such as have an invalidating clause attached, need more careful consideration. This is especially true of decisions concerning ordinations and marriages. The right of interpretation is reserved to the *Pontifical Commission* set up by Benedict XV for authentically interpreting the Code. Decisions are rendered in a disciplinary or administrative way by the *S. Congregations* and, if a judiciary procedure is required, by the *S. Tribunals,* with due regard to the special laws of the Holy Office.[9]

8 See fr. 10, 11, dig. 1, 3: "*Neque leges neque senatus consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quae plerumque accidunt contineri. Et ideo de his, quae primo constituuntur, aut interpretatione aut constitutione optimi principis certius statuendum est.*"

9 See can. 1555, § 1.

That such a *power must exist* in the Church is evident from the fact that interpretation as well as decision can intimately be known and applied as conformable to the law only by the lawgiver himself. Besides, if private interpretation or private application were permitted, it would follow that the subjects are either *a pari* with, or even superior to, the lawgiver; which would overthrow all authority. For self-love and self-interest and strong determination would jeopardize every law.

Historical instances, in the form of appeals to the Apostolic See, are not wanting. In the second century Anicetus and Victor I were approached concerning the paschal celebration.[10] SS. Athanasius and John Chrysostom brought their troubles before Popes Julius I and Innocent I. Very remarkable is the attitude of the African bishops towards appeals to Rome. They admitted the fact, but denied that the law was to be found in the Nicene canons, which was true, because the edition of the canons of that council which the African bishops possessed did not contain the text on appeals. For this text belongs to the canons of the Council of Sardica, which in other Roman editions were added as Nicene canons. Hence the mixup.[11] Of the matrimonial cases of Lothaire and Robert it is enough to make passing mention. The later practice need not be mentioned, for the Decree of Gratian and the Decretals bear ample witness to the exercise of the judiciary power by those who were said to include all laws in their bosom.

3. *Coercive power* finally is required to render both the legislative and judiciary power efficacious and respected. It is essential to power in general, although we should be

10 Irenaeus, *Haeres.*, V. 24; Coustant, *l. c* , col. 99; col. 1042, where Boniface I confidently asserts that the most prominent Eastern churches had consulted Rome in matters of great importance.

11 Coustant, *l. c.*, col. 982 noted; col. 1018.

careful not to confound it with the essence of right. Power is essentially public force or enforcement for the public welfare. This demands that the public order be reëstablished or repaired where it has been publicly violated, as is seen in the last volume of our Commentary (Book V). St. Paul was of this same opinion when dealing with the Corinthians.[12] The very fact that excommunication and deposition of clergymen date back to the remotest ages of the Christian Church should suffice to prove the existence of this power.

This, then, is the threefold power around which all the powers of the Church cluster and to which the Code may be reduced.[13] Although the end of the Church is preeminently a spiritual or supernatural one, yet it is also religious and public. Religion means to bind man to God, or to make him again choose God whom he had lost by disobedience. The worship of God, taken either speculatively or practically, is a public manifestation of the spirit of sacrifice; it binds the individual as well as society, and must be exercised in the form and according to the rites which God Himself prescribes through His legitimate agents. The moral influence of the Church on human society is of untold benefit to the nations that submit themselves to it. A brief sketch of the historical relation between Church and State may not be amiss.

12 See I Cor. 5, 4. ff.; II Cor 10, 6; 13, 10; II Thess. 3, 14.

13 The Code vindicates to the Church an *inherent and proper right* for the following:

a) Her existence as a divinely established corporation; can. 100, § 1.

b) The divine right of existence, propagation and teaching; can. 1322; 1384, 1395 f.

c) To possess her own schools; can. 1375.

d) To educate her clergy according to her own principles; can. 1352.

e) The right of possessing property; can. 1495 f.

f) The judiciary power; can. 1553, § 1.

g) The coercive power; can. 2214, § 1, to which canons we refer the reader for a fuller explanation.

CHAPTER III

CHURCH AND STATE [1]

Before the various phases of this relation are pointed out it must be plainly stated that by "State" we mean that perfect society whose aim is to procure the temporal welfare of its members. We are not concerned with the simple or compound forms [2] which a civilization may take on in the beginning and change in the course of its development. But we do say that the *origin* of the State is *divine*, or rather, based on the natural law; for all authority is from God, and the tendency of individuals as well as of families and tribes to form an organization for mutual help and protection, increase and development, is a natural result of man's being a social being.[3] Therefore, we discard not only the revolting idea of the diabolical original of the State, but also the mechanical, fictitious, and revolutionary theory of Rousseau, described in the *Contrat Social.*

The essentials of a State are: sovereignty, a people, and a circumscribed territory.

SECTION I—ANTAGONISM BETWEEN STATE AND CHURCH

Christ proclaimed that what belongs to Cæsar should be

1 For literature on this subject in general see the manuals of Church History as well as of Canon Law, *e.g.,* Scherer, *K.-R.*, 1886, Vol. I, p. 29 ff.; Sägmüller, *K.-R.*, ed. 2, p. 38 ff.; Wernz, *Ius Decretalium*, 1898, Vol. I, p. 16 ff.

2 *Simple* forms are the purely monarchical, the aristocratic and the democratic, whilst *compound* forms are those mixed or made up of more than one of the foregoing, *e.g.,* constitutional monarchies, democratic republics.

3 Leo XIII, "*Diuturnum illud,*" June 29, 1881; "*Immortale Dei,*" Nov. 1, 1885.

given to Cæsar, and what belongs to God should be rendered to God.[4] State and Church, therefore, being each supreme in its own sphere, should coöperate in promoting the welfare of the human race. But the Church has seldom found the State ready and willing to coöperate with her, and the record of the struggles between the two societies fills more than a brief chapter in ecclesiastical and civil history.[5] The struggle commenced with the very propagation of Christianity, and reached its height when Diocletian (284-305) issued his bloody edicts. The *causes* of the persecution of the Christians are variously assigned, but the fact cannot be denied that the Christian name lay at the bottom of the Roman hatred against a "ruinous superstition." For the Christian name involved aloofness from the religion of the Roman Empire, which was both idolatrous and immoral; it entailed separation from many places, persons, and occasions which were more or less tainted with the spirit of forbidden worship and superstitious practice. Therefore the Roman citizen would naturally look unfavorably upon a religion opposed to that which was professed and supported by, and, as it were, bound up with the Empire. That the outbursts of the rabble caused the magistrates to follow a policy of persecution need not surprise us. Yet even the Flavians or Antonines were rather passive to the hostile attitude of the *plebs;* their tendency being more towards oppressing than suppressing the Christian religion. This attitude, however, changed in the second half of the third century, when Decius ushered in his policy of crushing a

4 Matth. *22, 21*

5 Tacitus, *Annal.,* XV, 14: "*Nero subdidit reos . . . repressaque in praesens exitialis superstitio rursus erumpebat . . . igitur primum correpti qui fatebantur deinde indicio eorum multitudo haud proinde in crimine incendii quam odio humani generis conjuncti.*" See Funk, *Manual of Church History.* 1913, Vol. I, p. 39 ff.; J. B. Weis, *Christenverfolgungen,* 1899; P. Allard, *Ten Lectures on the Martyrs,* 1907.

sect that seemed opposed to his political schemes. For his was the purpose of purifying the tottering morality of the old State system. This purpose was pursued also by his successors, who endeavored besides to breathe new vitality into the politico-religious corpse through Neo-Platonism. Hence Christians were bid to sacrifice to the gods, to acknowledge the religion of the State by Purification, or rather to deify the imperial *Pontifex Maximus*. A systematic persecution was initiated by Valerian, who aimed at the very heart of the Christian religion by declaring it a dangerous and nefarious corporation, a *religio illicita*. Not much different, but more pointedly political, was the motive of Diocletian's persecution, which exceeded all others in cruelty and duration. The Roman law, indeed, would have been elastic enough to admit a "strange religion" under one pretext or another, at least under the name of a society or body of charitable persons for burial purposes or other similar ends. But the mob could appeal for support to the same law. The bill of complaint which the lower class brought forward comprised crimes of incest, infanticide, misfortunes of every kind — calumnies which were readily believed by weak magistrates. Besides these unfounded accusations there were others which the Christians could not refute, because bound up with their religious profession, such as denial of the gods acknowledged by the State, refusal of worship due to the emperor, the organization of a secret religious sect not ratified by law — all under the title of *crimen laesae majestatis*. Thus there developed a fight for principles which meant life or death for either.

Sint, ut sunt, aut non sint may be applied to the period following the persecution of Decius. But the Church came out victorious, while the State decayed by reason of

its own interior weakness and through the onslaught of external foes.

SECTION 2—THE EASTERN CHURCH AND BYZANTINISM

Constantine the Great (died 337) by the edicts of Milan (312-313) ushered in a new era, first of peace and then of superiority of the Church over the State. Toleration, acknowledgment of property rights, and the privileged state of the clergy followed one another in close succession. Gratian abdicated in 382 the title of *Pontifex Maximus,* the Roman senate saw the overthrow of the statue of Victoria, the temples finally abandoned, and the vestals' fire extinguished. Rome also had to witness the removal of the capital to the Golden Horn. These are momentous facts for the development of the "Papal Monarchy."[6] But victories are not always pure gain, they often entail losses. Thus also the predominance of the Church was accompanied by a strange mixture of imperial and ecclesiastical legislation, which has been justly called *Cæsaro-Papism.* It is quite true that some emperors considered themselves rather the protectors of faith and authority than the usurpers of a power not their own, and as such convoked and assisted at general councils.[7] It is true also that the popes invoked the imperial power to defend the unity and order of the Church.[8] But the emperors certainly went too far when they issued disciplinary laws without the coöperation of the ecclesiastical authority and they overstepped every boundary when they meddled in matters of dogmatic definition.[9] Such power

6 See W. D. Barry, *The Papal Monarchy,* New York, 1902.

7 See cc. 2, 3, Dist. 96.

8 *Ep. Coelest. I. ad Theod. Imp.* (Migne, P. L., 50, 511); *Leonis I, Epp.,* 24, 54, 125, 162, 164 (Migne, *l. c.,* 54, 735, 855, 1067 f.; 1143, 1147).

9 Specimens are: the *Henoticon* of Zeno, Justinian's rôle in the Three Chapters Quarrel, the *Ekthesis* of Heraclius, the *Typos* of Constans;

was not vested by the Founder of the Church in the emperor, who mistook his mission by lording it over the spiritual power. St. Gregory the Great reminded Mauritius (582-602) of this trust in these words: "For that purpose is power given from above to my pious lords over all men, that those who strive after good may be helped, that the way to heaven may be broadened, that the earthly kingdom may serve the heavenly kingdom." [10] This is the papal and the Christian programme, which was not understood by the emperors on the Bosporus, who proceeded to make the Church the handmaid of the empire, and the patriarchs, metropolitans, and bishops court chaplains, until schism and Mohammedanism plunged the Eastern Church into stagnation and Islamic slavery.

SECTION 3—THE WESTERN CHURCH UP TO GREGORY VII

The political upheaval following the downfall of the old Roman Empire found the Church ready and equipped with youthful fervor to receive the Teutonic barbarians, free men, but destitute of culture. It brought them under the creative influence of a humane religion; taught them the elements of Greek and Latin civilization, and equality before the law, which was a principle at once Christian and Roman.[11] At the beginning of the Middle Ages the State was so barbarously constituted that the Church was obliged to supervise its administration, to take a hand in the civil government, in order to infuse some order into civil matters and to preserve her own rightful freedom and independence.[12]

The *Franks* were the most conspicuous representatives

cfr. Permaneder, *Handbuch des K.-R.*, 1846, I, 62 f.

10 *Gregorii I, P. Registrum Epistolarum*, ed. Ewald-Hartmann, 1891, I, 221.

11 Barry, *l. c.*, p. 425.

12 *Brownson's Works*, Vol. 18, 218.

of the invading hordes, and they assimilated themselves with the Celto-Roman as well as with the Christian elements more thoroughly than the others. Within the Frankish kingdom the Church remained intact in her constitution and in possession of her fundamental rights,[13] although it cannot be denied that the Merovingians and the powerful Charles Martel did not scruple at times to encroach upon ecclesiastical property and other rights. Yet, on the whole, the relation between Church and State was that of a *brotherly confederation,*[14] which was more firmly cemented when the Roman patrician Charlemagne became emperor on Christmas Day, 800. Christian medieval Rome became to the Western peoples what Delphi had been to the Greeks, an oracle which decided the issues of peace and war, and held them in the bonds of a common brotherhood. Thus it became true what St. Augustine said in his monumental work, "On the City of God," that there was a divine kingdom which heathen Rome could persecute, but the final triumph of which it could not prevent.[15] Witnesses to this good relation were the *placita mixta,* the mixed synods, in which temporal and spiritual affairs were brought up for deliberation and decision; the extended exemption or immunity of the higher and lower clergy from secular courts; the many diplomas issued in favor of bishoprics and abbeys, etc.

But this last practice proved a stumbling block in the peaceful course of *sacerdotium* and *imperium.* The feudal system made bishops and abbots not only ecclesiastical superiors but temporal lords and vassals of the temporal overlord, the king or the emperor. No serious resistance could be thought of under weak and unworthy popes, such as disgraced the papal throne in the tenth

13 Permaneder, *l. c.,* p. 63 f.
14 Scherer, *l. c.,* p. 32.
15 Barry, *l. c.,* p. 2 f.

century. The Teutonic emperors, besides, were too strong, and the popes weakened by the constant assaults of the Roman, Tusculan, and Spoletan nobility. Lastly, the spiritual element had little influence on a married or concubinarian clergy, tainted with simony and feudalism. These evils were deeply rooted, but also readily perceived by men in exalted positions.

SECTION 4 — FROM GREGORY VII TO THE REFORMATION

Cluny was a hearth from which the fire of true reform proceeded. From there the Pontiffs received, if not the vows, at least the impetus of spiritualizing the worldly atmosphere of their court. This is true of Leo IX as well as of Gregory VII, who stands forth like a giant against the onrush of a perverted clergy and powerful political antagonists. The war cry: "Here Ghibelline, here Guelf," meant an onward march towards *ecclesiastico-political superiority,* which was begun under Hildebrand, the monk, and brought to a standstill under Boniface VIII, whose successors had to witness a clouding the splendor of the sun, the moon becoming brighter.[16] Events, and the spiritual union of all Western Europe under one religious sceptre, urged this condition on those who wielded the spiritual sword. Pope and king were taught to consider themselves servants of God in truth and justice, as moral powers whose realms embraced the whole range of religious, moral and civic virtues, the interpreter of which could only be the spiritual head of the one united Body of Christ.[17] That trespassing beyond the limits assigned in this plan was possible and

16 Gregory VII, *Ep.* 21, *lib. VIII, ad. Herim. Mettens.,* appears to have first used this simile to represent the relation between the two powers; see c. 6, § 4, x, I, 33.

17 Permaneder, *l. c.,* I, 66.

actually occurred, no one will deny, but the traditional view-point was in favor of the Popes.

The important *events* which shaped the destiny and raised the Church to a dizzy height are well known to the student of history: the fight against investiture; simony and incontinence; the crusades, the fight for liberty of the Lombard cities, the struggle of the Hohenstaufens for the North and South of Italy, thus hampering the little Duchy around the Tiber on every side, the awakening of the science of civil and canon law, etc. Add to these most prominent factors the renaissance of the national idea in England as well as in France, which also began to assert itself in Italy against the Teutonic invaders, the dawn of humanism with all its good and evil consequences — and the decrease of the splendor and authority of the Church is sufficiently explained. Concordats, too, from that of 1122 to those concluded with the German nation and France, influenced the relation between Church and State.

This relation was variously described and urged according to the Ghibelline or the Guelf parties, neither of which was free from exaggerations. The gist of the writings in favor of the papal power is exhausted in two terms: absolute power in judiciary and property rights. The Pope possesses two swords, according to Luke 22, 38 — the spiritual one, which is always ready for exercise and use, and the temporal or material one (*in potestate et nutu*), which must be drawn by others at the Pope's command. The full *property-right* is quaintly enough vindicated to the Pope as the supreme lord of all earthly possessions to whom all, as serfs and vassals, owe submission and dues.[18]

18 See Scholz, *Die Publizistik zur Zeit Philipps des Schönen und Bonifaz VIII*, 1903 (Stutz, *Kirchenrechtl. Abhandlg.*, 6–7), pp. 65 ff., 467 f., 477 ff.

That a *direct and an indirect power* would be derived from such theories goes without saying. But a reaction also is naturally explained, which exaggerated the power of the temporal rulers, deriving it either from their Roman predecessors or from the sovereignty of the people, to which the Pope, too, must submit. Such contrary theories could only be set up by men who had lost sight of the distinct aims of both powers. They paved the way to a lessening of the spiritual authority, which also suffered from the Avignon captivity and the subsequent Western schism.

SECTION 5—FROM THE REFORMATION TO THE PRESENT

The disruption of the religious union was fatal, not only to the spiritual authority, which was insulted and rejected by the self-constituted reformers, but also to the civil power, which was first, against their own principles, pampered by the Protestant champions, but afterwards, perhaps unwittingly, shaken in its very foundations. The world-war of 1914-1918 was the climax of the principle of dissolution. We shall, but only by way of antiquarian reminder, briefly describe the various systems which were invented in order to throw the semblance of organization around the structure of disorganization.

a) The *episcopal system* transferred the power of the former spiritual and temporal lords, *i. e.,* bishops and lords, to the temporal rulers at least with regard to the Protestant subjects. That the King or Kaiser should be a *patricius* to the dissentient sects was evident.

b) Worse than this was the *territorial system,* according to which the actual incumbent of the civil power could determine the religion of his subjects like a fashion or fad.[19]

19 Hence the well-known saying: *cuius regio, illius et religio.*

c) The *collegiate* and *corporate system* of the XIVth century [20] was a faint repetition of the principle of popular sovereignty in all matters on the presumption that all ecclesiastical power was radically vested in the laity, or rather in municipal corporations, which, by accepting the Reformation, ceded it to their temporal rulers. As it was given by the municipalities, so could it be reclaimed by them.

Such theories and their practical application in Protestant countries could not fail to move Catholic rulers to at least a partial imitation. The *Rationalists* and other schools were at work trying to force the Church into a condition of dependency which she was compelled to mitigate by mutual conventions and sometimes concessions hardly compatible with a sovereign society. The so-called Catholic systems were honored by prominent names: *Gallicanism, Febronianism, Josephinism,* etc., although all three aimed at the superiority of the State over the Church, State-absolutism, negation of the primacy of the Pope, undue exaltation of the episcopal power, interference of the most brazen kind in purely ecclesiastical matters, especially the education of the clergy and mixed marriages.

In order to give this domination on the part of civil government over the Church a semblance of law or justice, the defenders of these systems used, as we would say, "big words." The best known of these were the "*ius cavendi,*" which included the usurped rights of the royal *placet,* the appeal from abuses; the *ius exclusivae, i. e.,* the alleged right of excluding disagreeable candidates from higher and lower ecclesiastical offices; the *ius reformandi, i. e.,* the right to suppress alleged abuses in matters of a strictly religious character, such as processions, pilgrim-

20 See Scholz, *l. c.,* pp, 64 f., 316 f., 348 f., 452 ff.

ages, confraternities, while leaving the undermining secret societies untouched; the *ius advocatiae,* or privilege of protecting the "essential rights"[21] of the Church, to take cognizance of dangerous books, to convoke councils, to limit the alienation of church property, etc. This was the condition or at least the tendency of most of the European countries up to the year 1914, when the god of war, or perhaps the Lord of Hosts, shattered these idols of human invention like useless logs — *inutile lignum.*

Yet traditions are tenacious, and inveterate habits are not easily relinquished, although it is now clearly time to do away with an unfounded and detrimental statolatry.[22]

In concluding these few remarks one other observation must be added: The *Code* has barely touched the relation between Church and State, the object of the codification being the internal, not the external or juridical condition of the Church. Therefore the Code does not pursue any aggressive policy, or legislate directly for those outside the Church. It breathes a spirit of moderation and reserve.[23]

Before we continue the historical relation it appears logical to dwell on two topics which call for a closer inspection. The first is *concordats.*

CONCORDATS [24]

The period from Gregory VII to the Reformation is marked by a constant struggle between Church and State,

21 Which were the essential and which the accidental rights of the Church depended on mental abstractions of the various authors or expounders.

22 See *Brownson's Works,* Vol. 13, p. 133.

23 Stutz, *Geist des C. I. C.,* 1918, pp. 105, 109, 124 f.

24 For reference see: Baldi, *De Nativa et Peculiari Indole Concordatarum,* Romae, 1883; Bernheim, *Das Wormser Konkordat,* 1906; Cagiano de Azevedo, *Natura e Carattere Essenziale dei Concordati,* 1850 (German tr. by Brühl, 1853); Fink, *De Concordatis (Dissertatio Lovan.),* 1879; A. Giobbio, *I Concordati,* 1900; Nussi, *Conventiones,* 1870; Schulte, *Die Lehre von den*

and as war is generally followed by a treaty, we find in this epoch the beginning of the later conventions. If we here enter upon the subject-matter of concordats, it is done with the intention of completing the historical review we have given, knowing full well that countries where separation of Church and State prevails, are not directly concerned with such covenants. The Code (can. 3) mentions conventions, to which we added a few words of explanation. But it seems worth while to give fuller attention to a subject which, now that the moral influence of the Apostolic See is on the increase, may yet play an important part.

1. *The Name.*—The agreement between Paschal II and Henry V (1111) was called *pactum, conventio*, in the papal official documents. The formal pact between Calixtus II and the same Emperor was styled by contemporary writers "*pax et concordia,*" although *conventio, foedus,pactum* [25] also occur; but the inscription of the original text of the Concordat of Worms (1122) reads; *Privilegium Imperatoris* (1122), *Privilegium papae,* and begins "In nomine sanctae et individuae Trinitatis."[25] Later conventions were called *concordata, tractatus, conventa,* until 1801, when *conventio* became the usual and almost exclusive term.[26]

2. *History.*—Concerning the historical development of concordats it may be safely said that the "*Pactum Sutrinum*" of 1111 was the preliminary to the Concordat of Worms or the "*Pactum Calixtinum,*" which was to ensure perpetual peace and concord between the Church and the Empire.[27] However, there was no principle at

Quellen des Kathol. Kirchenrechtes, 1860, p. 435 ff.; Wernz, *Ius Decretalium,* 1898, Vol. I, p. 189 ff.

25 Bernheim, *l. c.,* p. 42 ff.; p. 10 ff.

26 *Conventio* is first used in that of 1630; Nussi, *l. c.,* p. 39.

27 Bernheim, *l. c.,* p. 44.

stake at that time which would rend the tie between the two powers. Still the "*Pactum Calixtinum*" was considered a real treaty or convention by contemporary and later authors.[28] Other concordats with the Teutonic nation or several princes of the Holy Roman Empire were concluded. After the Council of Constance, Martin V entered upon the "*Capitula Concordata*" with the German nation, in 1418; its purpose was the reformation of the Church in head and members. Another concordat was concluded in 1447 between Nicholas I and Frederick III, for the "union, peace and tranquillity" of the universal Church. But these *concordiæ* were obliterated towards the end of the XVIIIth and the beginning of the XIXth century, and the changed conditions of the times made it necessary to conclude new treaties between the single states of Germany and the Holy See. In course of time *Bavaria* (1817), *Prussia* (1821), *Würtemberg* (1857), and *Baden* (1859) concluded separate "conventions" with the Holy See. *Switzerland*, too, or at least some cantons (Diözesanstände) ratified a treaty in 1827 and 1845. *Austria* in 1855, made the famous "*conventio*" with the Holy See, which the liberal leaders violated, but the hierarchy upheld and which proved a very satisfactory solution of many problems.

In *France* the first attempts, made by Martin V, were rendered illusory by King and parliament, the tendency then being towards the later Gallicanism and State absolutism, to which the "Pragmatic Sanction" of 1438 amply testifies. No wonder, therefore, that the "*Concordia*" entered upon by Francis I and Leo X, in 1516, was considered a papal victory, which however did not last a generation and was never fully carried out by the "most Christian King" or the parliament. After the first rev-

28 *Ibid.*, p. 46 f.

olution, Pius VII was morally compelled to conclude with Napoleon, in 1801, a "convention," to which the powerful First Consul added his own "Organic Articles," which were intended to sap the vital organism of the Church. How the Concordat was abrogated by the State in 1904 and 1905, need not be rehearsed.

The Kingdom of *Portugal* had early entered upon a "*concordia,*" with the Holy See. One was concluded between the prelates of that realm and its King, Denys, in 1289; another in 1516.

Spain under Philip V, in 1737, made a "Trattato" with the Apostolic See, which was solemnly promulgated by Benedict XIV, in 1753. Almost one hundred years later, in 1851, Pius IX was compelled to formulate a new "*conventio*" with Queen Elizabeth, to which additions were made in 1853.

Italy, respectively Sardinia, the two Sicilies, and some other principalities, made several covenants with the Apostolic See.

Gregory XVI succeeded in submitting certain "articles on which a pact was made," to Nicholas of Russia, in 1847, for his country and Poland.

Belgium settled its relations with the Holy See, in 1827, by a "conventio" with William I.

The *Republics of Central and South America* established "conventions" with Rome since 1853. First Costa Rica concluded one with Pius IX; it was followed by Guatemala, Hayti, Honduras, Ecuador, Venezuela, Nicaragua, San Salvador, and later Mexico.

Bulls of Circumscription.— A special kind of concordat were the agreements which described and settled the boundaries of dioceses after the wholesale *secularisation of 1803.* By a "Decree of the Imperial Deputation" all property belonging to pious foundations, abbeys, and mon-

asteries was placed at the free disposal of the respective princes, to be used either for the maintenance of public worship, for the support of educational or other public establishments, utility, or for the relief of the State finances."[29] This politico-ecclesiastical upheaval made the reëstablishment of dioceses and of law and discipline imperative. But, on account of pragmatic difficulties, concordats in the proper sense were avoided and a solution was found in the so-called *bulls of circumscription,* issued by the Pope and promulgated by the respective rulers in their countries as State laws. These charters contained the number and boundaries of the respective dioceses in each country, the endowment of episcopal sees, the number of dignitaries and canons of the chapters, enactments concerning seminaries and their endowment, also the rules governing the nomination or appointment of bishops and canons. Thus a juridical basis was found for peaceful civil and ecclesiastical government.[30]

3. *Character of Concordats.*— Different opinions prevail among authors as to the precise character of concordats, but all must concede that it is some sort of an agreement. The general definition of contract also applies to concordats. A contract is an agreement between two or more individuals upon the same subject or object.[31] It implies the contracting parties, a promise and a consideration, as well as a subject or thing. Broadly speaking, therefore, *concordats may be defined* as agreements entered upon between the Apostolic See and the lawful rep-

29 Funk, *Manual of Church History,* 1913, II, 216 f.

30 Schulte, *l. c.,* p. 505 ff.

31 L. 1, § 2, Dig. 2, 14. Blackstone Cooley, *Commentaries on the Law of England,* Chicago, 1879, II, 442, defines contract as "an agreement upon sufficient consideration, to do or not to do a particular thing," and points out three elements: agreement, consideration, thing.

resentatives of a country, concerning ecclesiastical affairs affecting that particular country.[32]

The contracting parties are the *supreme rulers* or legitimate representatives of both powers. On the side of the Church it is certain that only the *Pope* can validly conclude a concordat, to the exclusion of inferior prelates. It is quite true that, for instance, the prelates of Portugal made a treaty in 1288, but Pope Nicholas IV ratified it.[33] Thus German bishops also treated with the respective secular princes, but their treaties involved only particular negotiations, as far as their power reached. For against the common law — and concordats, as can. 3 clearly supposes, often contain matters or stipulations which are against or at least beyond the *ius commune* — the bishops cannot make a compact or determine the relation between Church and State.[34] The Pope sometimes dispatches or makes use of a *legatus a latere,* as was the case in the German Concordat of 1447, which was negotiated by John Cardinal Carvajal; sometimes of a nuncio or pronuncio, as happened in the Austrian Concordat.[35] These, then, act as papal plenipotentiaries and sign their names as such.[36] On the part of the *civil government* the mode of concluding a concordat depends on the form of government and the written constitution of the country.[37] In purely monarchical realms the supreme ruler alone is competent to conclude a concordat and to propose it as a state law. In constitutional monarchies the law determines the powers of the monarch as well as of parliament.[38] This is also true of republics. Our American Constitution

32 Fink, *l. c.*, p. 8 f.

33 Nussi, *l. c.*, p. 3.

34 Schulte, *l. c.*, p. 445.

35 Nussi, *l. c.*, p. 15: "*Sede Apostolica auctoritate* (*sic*) *suffultus*"; p. 310.

36 Nussi, *l. c.*, p. 318.

37 Only suzerain states, no protectorates, can conclude treaties; but much depends on the dependence, either written or oral.

38 Schulte, *l. c.*, p. 446.

reads: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties,, provided two-thirds of the Senators concur."[39] What Westlake says[40] of treaties may be here applied: "The contracts of States are not tied to any form. The essential is that they shall be concluded with the assent of the contracting authority of each party." This authority may be called by the common name of *foreign minister.* When the contract is drawn up formally like a deed or notarial act between private persons, it is called a treaty or convention. Such an act always needs *ratification* by the highest authorities, whether, as is now usual, that necessity is expressly reserved in the treaty or not. The actual rule is equivalent to saying that credentials, however expressed, and notwithstanding the implication of full powers contained in the name *plenipotentiary,* empower the representative to nothing more than to negotiate and to conclude a provisional agreement. Therefore the contracting parties may, after this provisional conclusion, demand modifications or interpretations or reservations before ratifications are exchanged.

When the *ratifications of a treaty have been exchanged,* it becomes law or right in the respective country, to which all subjects of the Catholic Church including the hierarchy, must submit; members of non-Catholic denominations are not concerned.[41]

What we have said thus far appears to suppose that concordats partake of the nature of *bilateral contracts.* Such, we maintain, a concordat is, against *various theories* which may be reduced to three groups.

1. The theory of *privilege* has been adopted by dia-

39 Const., Art. II, sect. 2, clause 2.

40 *International Law,* 1910. Part I: "Peace," p. 290 f.

41 Schulte, *l. c.,* p. 441, *p.* 446 f.

metrically opposed writers. Those who believe in *State omnipotence* look upon concordats as favors or privileges granted by the State, which may, therefore, recall them at any time without violating any divine, natural, or positive law. Considered in that light, the French government acted properly and justly: for it recalled its own favor by abolishing the Concordat of 1801. This theory proceeds from a well-known school of Regalists and Liberals, who regard the State as the source and origin of every right and law, the only saviour of mankind, the embodiment of justice and truth. We need not refute such a one-sided and historically unjustified view.

On the other extreme there is a small coterie of Catholic authors, who take delight in extolling the *privileged character of concordats,* but on the *side of the Pope.* In their opinion it is the Apostolic See who grants a favor and accepts from the secular power the strict and one-sided obligation to keep the concordat. Therefore, says Tarquini,[42] it would be criminal to look upon concordats as bilateral contracts.

2. More mitigated is a theory which has lately been proposed and has found favor with some authors. It was elaborately set forth by *Wernz,*[43] although Cavagnis had espoused it before him.[44] This theory, briefly stated, asserts the duty of both parties to keep the contract, even though a concordat contain several articles or subjects which embody Apostolic privileges. But from the fact that there are privileges contained in concordats it does not follow that the Pope is not bound by any obligation concerning this privileged matter.

42 *Institutiones Iuris Eccl. Pub.*, ed. 13, 1890, p. 74.

43 *Ius Decret.*, 1898, Vol. I, p. 219 ff.; n. 173; for a faithful copy of Wernz's view see the *Catholic Encycl.*, *s. v.* "Concordats" (Ojetti).

44 *Institutiones Iuris Pub. Eccl.*, 1882, p. 391 f.

3. The third theory vindicates the character of a strictly *bilateral contract* to each and every genuine concordat, excepting no portion thereof. This theory is thoroughly Catholic, since it is defended by authors whose orthodoxy has never been suspected, for instance, De Angelis, Cavagnis, Fink, Palmieri, Sägmüller, etc. It appears to us to be the only acceptable and logical one, for the following reasons:

a) The contracting parties are *capable* of concluding such a contract or treaty. Their capability is doubtful under the theory of privileges, for the defenders of the superiority of the State look upon such a treaty as a degradation of the State, as against the moral dignity of the government;[45] whilst the defenders of papal superiority deny the parity of condition on the part of the contracting Pontiff. Parity or equality of rank, they say, is required. To appease the latter, the well-known phrase of Leo XIII with regard to the two powers governing the human race may be quoted, that "each power is supreme in its kind."[46] But the defenders of this theory commit a fundamental mistake, inasmuch as they overlook the actual, *hic et nunc*, condition of the two contracting parties. For when they contract, they are mere parties to the treaty, and enter upon it in good faith. Nothing else is required but that they are mentally capable of making a contract and free from coercion, and equal as contracting parties.[47]

There is an *object* attached to every concordat, whether we call it *end* or something else. Now, as seen from the very first concordat, the purpose of a concordat is to establish or confirm the union or peace between Church

45 Thus a staunch defender of the State theory (Aegidi), quoted by Schulte, *l. c.*, p. 435 f.

46 "*Immortale Dei*," Nov. 1, 1885.

47 Cavagnis, *l. c.*, I. p. 409, n. 655. As sovereigns, because sovereignty is one and indivisible, they are simply *a pari*.

and State. It is easy, but also vain, to assert that the State is obliged to keep peace with the Church. We all know that this is a *desideratum,* but actual conditions must always be taken into account, as they were by the popes who concluded such treaties.[48] To take it for granted that the State, especially now, when all religions are treated as equal, is obliged to uphold peace, union, and tranquillity, supposes more than ordinary intelligence. Besides, the very promise and subsequent civil law is worth something and amounts to a real benefit, which the State manifestly proposes to procure by legal means.[49]

This leads us to the *consideration* underlying the concordat. In private contracts this is the reason which moves the contracting parties to enter into the contract. In this sense it would rather fall under the purpose or end in the matter of concordats. But if the consideration is taken as something valuable, then consideration and things stipulated in the contract are almost, though not entirely, identical. For the consideration or thing may be stipulated by any of the four nameless contracts,[50] although the thing itself is not of material value, and therefore liable neither to sale, nor to exchange proper, nor to debt. There is a difference between private and public covenants. Private contracts require the delivery of the goods in one way or another, but public treaties may abstract from actual delivery, or refrain from certain acts required only at a determined instance, as for example to remain neutral, respect neutrality, etc. Hence we take consideration in the sense of a valuable consideration

48 See the concordat of 1447, and the Austrian concordat; Nussi, *l. c.,* p. 15, p. 310.

49 Wernz, *l. c.,* p. 247 grants that something is gained, at least *ex novo titulo, i.e.,* from agreement. This more solid and solemn agreement certainly is a guarantee for both sides.

50 Of the four kinds: (1) *do ut des,* (2) *facio ut facias,* (3) *facio ut des,* (4) *do ut facias,* 3 and 4 seem to express the consideration *in casu.*

which may be material or spiritual. But a consideration in one shape or another is essential to any kind of treaty or contract. It is quite true that the Church makes concessions, and the civil government promises to defend the liberty and rights of the Church; but if it is said that the State grants nothing but what it is bound to give,[51] this seems somewhat misleading. It is quite true that the Church is entitled to possess property and demand of the faithful the necessary means for the support of her ministers and worship.[52] But if the State is not merely composed of faithful, but every kind of citizens, can it be compelled to make contribution? No sensible author would assert that. Hence if the State, as such, promises a fund for purposes of worship and education and charity, and adds to it the enforcement of law, this is a kind of gracious act, acknowledged as such in the very wording of concordats.[53] Besides, it must be noted that it would be very difficult to draw precise and clear limits as to what the State is obliged to do, unless we regard it simply as the handmaid of the Church,—a theory which can scarcely be taken seriously now-a-days.

But the consideration, Tarquini says, implies *simony*, because something spiritual is given for a temporal profit. This objection is rather crude. For it would first have to be proved that the simony is *divini* or *ecclesiastici iuris*.[54] From simony forbidden by divine law the supreme lawgiver could not dispense, but he could declare whether or not an act is such. And if he has done so, by the very fact of concluding a concordat, authors may well

51 Cavagnis, *l. c.*, p. 395 f., n. 634.

52 See can. 1495 f. Remarkable is can. 1186, n. 1, where it is said that contributions for the maintenance of churches should be demanded *suasione magis quam coactione*.

53 *Conc. Austriae*, n. 30 f.: "*Ex publico aerario benigne praestat . . . gratiose succurret;* Nussi, *l. c.*, p. 316 f.

54 See can. 727.

leave the consequence to the Sovereign Pontiff. If the presumed act of simony is one forbidden by ecclesiastical law only, the Pope may dispense from it. Furthermore, as has been well observed,[55] if the consideration or price is properly understood, it changes its material nature by being transferred to the spiritual benefit of the Church, or because it is, as it were, spiritualized by the use of a religious society. The nomination to ecclesiastical appointments, which is here chiefly intended as involving simony, must be considered in the light of historical development and of the feudal system. The methods of election and appointment have changed considerably, depending as they do on human factors.

Lastly, a remark concerning the *double character* of concordats as explained by *Wernz*. His main argument runs as follows: There are articles which are privileges pure and simple. These cannot constitute the matter of a bilateral contract, because the Pope retains a perfect and strict right concerning the articles (privileges) thus granted, wherefore such privileges can be validly recalled even without reason, and the State does not gain a strict right to them. The answer to this more captious than solid argumentation is: First, it would need strong proof to show that the term privilege is used in the strict sense of a mere favor, liable to be recalled at any time, or in the sense it had in the Concordat of Worms, where *"privilegium"* is used for both the imperial and the papal pact. Up to the XIIth or XIIIth century the royal chanceries as well as the Roman Court used this term to denote a donation, prerogative or right of a permanent and stable nature. The *ius nominandi* or *praesentandi,* which is called a papal privilege,[56] has al-

55 Cavagnis, *l. c.*, p. 411, n. 657; 56 Conc. with France 1516; Nussi, Giobbio, *l. c.*, p. 31.

ways been looked upon as a strict right, if properly granted; it may be inherited and devolved on successors and heirs.[57] Besides, Wernz[58] himself says that papal grants may be made either by donation or by privilege; always it is a concession. But call it right, or acquisition, or favor, or whatever you will, it is an agreement not liable to recall or repeal at random. The reason for this lies in the *intention of both contracting parties.* It must, of course, be supposed that a concordat, like any other international treaty, or even a private contract, is concluded with the free will of the parties, and that no force or intimidation was resorted to which would render it void. Fraud also is and must be excluded, for it would equally vitiate the validity of the treaty.[59] Now, then, the intention of concluding a concordat resting on a voluntary act is certainly accompanied by the intention of obliging oneself to carry out the stipulations laid down therein. On the part of the Pope there cannot be the shadow of a doubt that he has the will and also the power to put the articles agreed upon into effect. In that respect he is even more independent than any temporal ruler. *The Pope* can use coercive power to give weight to his will, if inferior prelates should resist. He also *expresses his obligation* in unmistakable terms; thus Leo X: "we consent and wish said *concordia* to be observed inviolably and to have and hold as a true and obligatory contract in full force and strength."[60] Benedict XIV, in the convention with Ferdinand VI of Spain, concluded the treaty in these words: "His Holiness upon his faith as Sovereign Pontiff, and

l. c., n. 13; sometimes *indultum*, in the Bavarian Concordat of 1817; Nussi, *l. c.*, p. 150.

57 Thus in *Conc. Austriae*

58 *L. c.*, p. 214, note 126.

59 Westlake, *l. c.*, p. 290.

60 Nussi, *l. c.*, p. 34, n. 27; see also the threat of indignation on the part of SS. Peter and Paul if the concordat should be violated, in the Conc. of 1447, Nussi, *l. c.*, p. 17; the term "bilateral contract" occurs in several conventions; Nussi, pp. 271, 277.

His Majesty on his word of honor as Catholic King, mutually promise to each other as well as in the name of their successors, unalterable firmness and perpetual duration of all and each of the preceding articles." [61] According to the theory of Wernz this obligation, being based on a mere privilege, could not be mutual or strictly bilateral as far as it concerned the royal patronage or nomination to arch-bishoprics, bishoprics, and abbeys in the Spanish realm. Yet the Pope obliges himself solemnly and firmly *to all the articles* contained in said concordat. This may suffice. Only one more observation. If the Pope wishes to be sincere, he must point out which is the matter of mutual obligation and which are the privileges he grants. This would be a difficult and delicate matter and would most probably deter temporal rulers from entering upon a concordat. It is, therefore, more logical and more natural to say that the intention of the Pope is to oblige himself to the whole and entire concordat, as such, without distinction.

4. Interpretation and Abolition.— The object of concordats, in general, is peace and concord between the Church and the respective State. But there may be some points which are not stated distinctly or clearly enough, or there may be phrases that are ambiguous. Besides, as laws cannot foresee all the cases and circumstances that will beset their execution, so neither can concordats. Therefore, *interpretation* is sometimes required. In this procedure the general rules of interpretation should be followed. But neither is the intention of the contracting parties to be overlooked. Westlake [62] inclines to think that the interpretation of international contracts is and ought to be less literal than that given to pri-

61 Nussi, p. 128.

62 *L. c.*, p. 293.

vate contracts. This rule, as a whole, may be accepted, provided both contracting parties accept it, and none is worsted by the other. It must also be stated that the Church is entitled to have her interpretation with regard to points that concern her constitution and organic laws first heard and listened to. But in turn the Church should not refuse to accept views of the State concerning its own. For this reason it is sometimes added in the very text that difficulties should be settled by mutual co-operation or conference.[63]

The *abolition* of a concordat is either total or partial, according as the whole or only parts thereof are abrogated or derogated. The authors who look upon concordats as mere privileges must attribute a one-sided power of abrogation to either Church or State. The common theory of writers on international law is that, if not to all, at least to many treaties, is attached the tacit condition *rebus sic stantibus:* they are concluded in and by reason of special circumstances, and when those circumstances disappear, there arises a right to have them rescinded.[64] Thereby the door is opened to laxity. Yet there is some truth in this clause. For the Church as well as the State may find itself in a condition which may render the concordat not only useless, but detrimental to the welfare of both societies. To judge whether this is the case with regard to the Church, must be left to her; she should not, however, proceed to the abolition at once, but rather attempt a modification of the treaty.[65] The State, too, may by economic or political circumstances be brought to such a plight that abolition of a concordat appears to be desirable. However, unless a sudden revo-

63 Conc. Austriae, n. 35; Conc. Aequator, n. 24 (Nussi, *l. c.*, p. 318, 356).

64 Westlake, *l. c.*, p. 295.

65 Cavagnis, *l. c.*, p. 427, n. 684; Wernz, *l. c.*, p. 224 ff.: n. 175 f.

lution should prevent the authorities from laying the matter before the Apostolic See, a *rapprochement* should not be impossible. A one-sided, arbitrary dissolution by either party can only be styled a violation of mutual promises and a breach of human and natural law.

If a *change of government or political conquest* of a country or a part thereof takes place, the concordat which concerns the respective country remains in force. For a concordat affects the welfare of the faithful as a body, and this body, being a perpetual moral or artificial person, is entitled to the same consideration and acknowledgment of their rights and laws on the part of the new government as they were respected by the old one.[66] There is no other legitimate way of evading the obligation than by mutual agreement or mutual modification of the concordat legitimately concluded.

66 Giobbio, *l. c.*, p. 110 ff.

CHAPTER IV

THE INTERNATIONAL POSITION OF THE APOSTOLIC SEE

Concordats may safely be considered as international treaties, or at least as analogous to these. But now the question may be asked, and has been answered diversely, whether, after the year 1870, when the Papal States were annexed to Italia Unita, the Apostolic See still continues to be an international person or power. To this the Code answers in the affirmative. For not only the Catholic Church, but also the Apostolic See, is an artificial person, and that by divine right (Can. 100). And, indeed, the fact alone that concordats [1] were concluded even after the year 1870, should at least establish a presumption in favor of that view. For concordats were and are entered upon by the Pope, not as a temporal ruler, but as Sovereign Pontiff of the Catholic Church, Quite consequently, says Hefter, the Church in connection with its supreme bishop enjoys, even outside the patrimony of St. Peter (*i.e.*, the Papal States) an international, being an independent, power like other sovereign powers.[2]

International law has been treated rather roughly during the last five or six years. Treaties have been called "scraps of paper." However, what is said in the heat of war should always be taken with a grain of salt.

1 Thus Equador renewed the concordat in 1882; Austria, in 1881; Columbia, in 1887.

2 See Schulte, *Lehre von den Quellen des Kath. K.-R.*, 1860, p. 455, note 7.

Law is good and wholesome and even necessary, as long as men must live a social life, as long as mankind remains what it is since the command of God had been trespassed. Everyone is familiar with the definition of law as an ordinance of reason or a rule of conduct, given by authority for the common welfare of a commonwealth, and promulgated. International law, otherwise called the law of nations — especially by French authors: *droit des gens* — is the law of the society of States or nations.[3] It regulates the relations between States as sovereign subjects. State is now the definite expression of the former *regnum, imperium,* and came into use about the fifteenth century. It is well known that Hugo Grotius is looked upon as the father of international law, but modern writers on that subject, although they claim some relationship with Grotius and Pufendorf, yet are all more or less inclined to deny any connection between natural and international law. For them the only basis of the law of nations is positive law, made up of treaties and customs of the different components or sovereign subjects. But since customs are precarious, the authors themselves have chiefly formed the source of international law; and their interpretations have been accepted when it seemed suitable to the respective States. It may also be added that up to the year 1856, the *droit des gens* was considered to be resting exclusively on Christian principles. In that year the "Sublime Porte" was admitted to the international European Concert and made partaker of the advantages of international law. Of course, the Pope, as sovereign of his own States, was included in that union, and even vouchsafed the first rank, not by reason of his territory, but in virtue of his spiritual supremacy. Then came the twentieth of September, 1870—and now the

3 Westlake, *International Law,* 1910, Part I; Peace, p 1.

Pope, says Westlake [4] with Liszt,[5] has no international position; none as a sovereign — for by the loss of his territory, he has ceased to be one, and none as the subject-matter of an international contract, for there is no such contract relating to him. These are the two chief objections against the Pope holding an international position. But we may be allowed to inspect more closely these two cornerstones of the Positivist school.

The Church of Christ is a living organization, a compact institute, a society perfect as to its sovereign ruler, complete as to its end, and independent as to its means. This is and has ever been Catholic doctrine. The foundation of that organized body, the centre of its hierarchy, is the primacy of the Bishop of Rome. As bishops of Rome the popes succeed St. Peter and possess the plenitude of Apostolic power. Although the end of the Church belongs to the supernatural world, a world unseen but real, yet the realization of this end is worked out in this world. Members of this Church are men made of flesh and blood, and standing in need of material means to realize even the spiritual end. There is no complete society in this world without being visible or palpable at the same time. For the dreams of Wiclif and Hus and Luther of an invisible aggregation of predestined souls belong to the past. A society is embodied in a visible head with perfect autonomy in matters subject to him, with an end not identified with that of an inferior or equal or superior one, with means proper and conducive to that end in the pursuit of which that society has a claim to be recognized as a legal religious or religious-political body. Such a society must be acknowledged as possessing the right to act legally towards its members as well as towards outsiders. In other words, the Catholic Church,

[4] Westlake, *l. c.*, p. 9 f. [5] *Völkerrecht*, 1913, p. 49.

with its supreme hierarch, has a spiritual sovereignty or freedom from control in the domain proper to its character. Now this sovereignty comprises in round numbers 250,000,000 men, no matter where they live, East or West, South or North, no matter what the colors of the civil flag may be, red, white and blue, or red and white, or red, white, and green. And wherever there is a Catholic, whether at the South or the North Pole, he is subject to the Bishop of Rome or to the present holder of the Fisherman's throne, Benedict XV. He is a spiritual sovereign of a sovereign people in the Catholic sense of the word. The people belong to the Pope in matters spiritual and sacred. For it is certainly true that one belongs to a certain State, not precisely by reason of territorial supremacy, but in virtue of his citizenship, or by the acknowledgment of the public authority and commonwealth, to which he claims to belong. An American citizen is one in Rome or the Frieslands, as well as on the open sea, or in the State of Missouri. And a Catholic is such even though he live in a state persecuting the followers of Christ. There is a unity of faith and regime in the Catholic Church such as no other organization, either political or religious, can claim. And yet this does not conflict with the Catholic's duties towards the State, as the late war has clearly proved. We do not claim to be a State within the State, "*lo stato nello stato,*" as Cavour sarcastically stated the relation between Church and State; but we must claim spiritual sovereignty for the Catholic Church and the Roman Pontiff or Apostolic See.

Pasquale Fiore, in his *Trattato di Diritto Internazionale Publico,*[6] says that international sovereignty consists in that a commonwealth exists *iure suo* and exerts a juridical or legal activity which is independent from its territorial

6 Firenze, 1887, Vol. I, p. 463.

operation. Signs of international sovereignty are, according to all authors: the maintenance of diplomatic relations with other international subjects, the capacity of concluding treaties, and the right of declaring war and making peace. Now take the sovereign character of the Catholic Church, or the Apostolic See — for without the latter no Catholic Church may be imagined — as an autonomous society, with a complete end and independence in the pursuit of the necessary means as the foundation of the "society sovereign in its kind,"[7] and compare it with the three signs of international sovereignty, what is the result?

1) The diplomatic relations were maintained up to the beginning of the war with many countries, Russia not excluded. England has sent her special envoy to the Vatican during the war; France seems near to a *rapprochement* with the Vatican.[8] Historically speaking, we know of *responsales* or *apocrisiarii* at the court of Byzantium since Leo I (440-461.) More politico-ecclesiastical relations were maintained since the golden age of the nunciatures ushered in by the *Della Rovere* and *Medici Popes*. Concerning the United States see *infra*. There is one etiquette observed when a foreign diplomat visits the Pope. For even Protestant sovereigns, like the former Emperor of Germany and the Head of the British Empire, who have been the guests of the King of Italy, have started their visit from the embassy of the respective country, an extra-territorial place, to the Vatican. What all this diplomatic relation means, even after the temporal power has ceased to exist as a matter of fact, is expressed in the words of Visconti-Venosta, uttered in the Italian Parliament on the 22nd of April 1871: "The independence of

7 Leo XIII, "*Immortale Dei*," Nov. 1, 1885.

8 It is now established (Aug. 1921).

the Pope is an international question, and more than international." Cavour, the real designer of Italian unity, and certainly not too scrupulous in employing means, said on March 24th, 1861: "We must go to Rome, but on two conditions: we must go there in agreement with France; and in such a way that the uniting of this city with the kingdom of Italy may not be interpreted by the great mass of Catholics in Italy and outside of Italy as a sign of the enslaving of the Church. We must go to Rome, but without bringing about any diminution of the independence of the Pope. We must go to Rome, but without allowing the civil authority to extend its power to the spiritual order. If we succeed in realizing the second of the above-mentioned conditions, the first will not present many difficulties; if we succeed in uniting Rome to Italy without arousing grave fears in the Catholic body; if we, I say, succeed in persuading the great mass of Catholics that the union of Rome with Italy can be made without the Church ceasing to be independent, I think the problem will be solved." [9] The spiritual, world-embracing sovereignty of the Pope, it is that makes the potentates come to the Vatican or dispatch their envoys thither.

2) But there is another sign embodied in the Papacy: *the right of concluding treaties with any government.* We need not repeat what was said on concordats. But one thing is certain: that after the social upheaval in the provinces of the Central Powers some agreement must be made between the Apostolic See and the responsible authorities. Besides, Alsace-Lorraine will call for a settlement with regard to the bishoprics of Strassbourg and Metz, which were formerly under Prussian influence. Italy will have to come to terms with the Pope on account of the Trentino, and what is to be done in Herzegovina

9 Prior, *Is the Pope Independent?* 1906, p. 30 f.

and Bosnia is mere guesswork. Thus we see that stipulations or agreements are certainly required, unless the world shall end in anarchy. In the latter case, of course, we neither need nor look for any league of nations, but a chaotic and indigested mass and mess. However, as long as the world is governed by laws, laws binding with obligatory force the governed and the governors, by moral force at least, treaties will be made — whether secretly or openly. No Pope has ever broken a solemn treaty, unless it was first broken by the other party, by using might against right.

However, it was denied that the Pope could conclude a treaty worthy of that name, because he has no power to enforce its observance. In other words: a treaty without military power is a "scrap of paper." The answer to this objection is obvious. Coercion of right is a double one: material and moral. The material compulsion consists in the policeman's club, or ships, or shells, or rattling sabres. But this is neither the only nor the essential element of right and treaties, otherwise animals also might enter upon some sort of agreement between themselves, as we read in fables. The obliging force lies higher, in the ethical element of loyalty and faith and mutual trust, as Jellineck says.[10] Moral coercion is essential to any right or agreement, without it no contract can be thought of. And this is the sanction of our moral and social nature. It is not beyond us, it is born in the depth of human nature.

Another captious objection brought forward against true and real treaties is that the Pope, being the superior, because spiritual, power, cannot lower or degrade himself to concluding a mutual agreement with an inferior. For treaties suppose and require equality of the con-

10 *Die rechtliche Natur der Staatenverträge*, 1880, p. 58.

tracting parties. The answer has been already given: the Pope when entering a concordat does not assert his superiority, but merely the quality of the contracting party. He does not put himself on the watch-tower, but comes down to the level of a mortal man, who acts in good faith and requires nothing else but good faith. Thereby he does not forego or lower his dignity, but only posits a morally and juridically qualified act, which neither divine nor natural law reprobates or forbids. The Pope is a human being like any sovereign.

3) We have now to say one last word concerning the third sign or mark of sovereignty: *to declare war and make peace.* We willingly grant that this element cannot be fully vindicated to the Pope, after he has been stripped of his States. For he has no means now to fight against the French, or the Spaniards, or the Venetians, or the Neapolitans, as Alexander VI, Julius II, Leo X, and Clement VII had to struggle against these governments. The right of declaring war is inherent in the sovereign, yet the sovereign may at times be tied to a cabinet or parliament. In this latter case, sovereignty, though held to a certain extent by the ruler, is shared by the people or rather the parliament, as it is in Italy. This we say in order to demonstrate that the right of declaring war is not an adequate mark of sovereignty. Besides, we may be permitted to make another observation. In our United States, the people are the sovereign, not the executive, who, according to the Constitution, is tied to the vote of Senate in such an important matter. And justly so; for it is the people who have to furnish food and men, it is the people who have to suffer most in war. And the people of the United States are perhaps the most peace-loving on the globe. This was clearly shown at the presidential election of 1916. It was the peace bugle that

called the people to the polls to cast their vote for the one "who had kept us out of war." The further conclusions we leave to the reader. But again we say that the right of declaring war is a negative one, to be asserted by the sovereign only in extreme cases. It is the *ultima ratio,* the last and extreme means, to be resorted to. No doubt there were strong reasons for our entering the world war. But our fight was not, as usually happens, the desire of conquest, nor even, at least foremost, self-defense, although this latter thought loomed up in many minds. And yet we would have been a sovereign people without declaring war. To us it seems that those authors who claim the right of declaring war as a distinguishing mark of sovereignty are prompted by the lust of might, not by right. A sovereign is first and above all set up to procure the temporal welfare of the people. St. Paul tells us that princes are not a terror to the good, but to the evil (Rom. 13, 3). He exhorts the faithful to pray for those in power, that we may lead a quiet and peaceful life (I Tim. 2, 2).

To make peace! this, too, belongs to one in high station. Certainly the Pope did all in his power to restore the peace.

We may add a further consideration. War is might, and behind the assertion that a sovereign must be vested with the power of declaring war, there lies the old view of the Positivist school, that without might there is no right. We have already answered that objection. But this leads us somewhat further. If arbitration is possible and workable, so as to set up an international tribunal to enforce peace, then certainly sovereignty may be claimed, even if the material, wild and beastly force of declaring war is laid aside. Otherwise small powers would not be entitled to the name of sovereigns or to enter the League

of Nations, for, after all, a league of nations or compulsory arbitration must finally be based upon moral force, ethical conviction, honesty and faith. Read the fine speech of Senator Reed of Missouri, in the *Congressional Record* of November 21, 1918. In the League of Nations, if it can or shall be realized, the Pope must have a place. Else it will all be in vain. For no matter what unbelievers and non-Catholics may think or be taught concerning the papacy, it stands to reason that an imperishable force of morality, supported by the strongest organization and backed by 250,000,000 of members, cannot be ignored. It stands to reason that the Holy See, which stood the onslaught of bloody persecutors and wavered not among the whirlwind of barbaric invasions, which never tottered when virulent attacks tried by every means to shatter its foundation from within, which did not stoop to the mighty Corsican, and was not erased from the earth when the temporal power was taken away from it, is a bulwark that cannot but be helpful to a union of peoples.

But let us return to one other objection which is set forth in the sentence of Westlake: The Pope has no international position, as the subject-matter of an international contract, for there is no such contract relating to him (*l.c.*, p. 38). This is true, to some extent, because the Law of Guarantees, passed the 13th of May, 1871, by the Italian government, is in itself a State law, not an international law. Here are its chief provisions:

Art. 1. The person of the Sovereign Pontiff is sacred and inviolable.

Art. 2. Any attempt against the person of the Sovereign Pontiff, and provocation to commit the same, shall be punished with the same penalties laid down for any attempt and for provocation to commit the same against the person of the King.

Offences and public insults committed directly against the person of the Supreme Pontiff by speeches, deeds, or the means indicated in the first article of the law on the press, shall be punished with the penalties laid down in the 19th article of the same law.

The aforesaid breaches of the law are matter for public prosecution and belong to the competency of the Court of Assizes.

Art. 3. The Italian Government pays sovereign honors to the Supreme Pontiff in the territory of the realm, and preserves to him the pre-eminence of honor paid to him by Catholic Sovereigns.

The Sovereign Pontiff can retain the usual number of guards attached to his person and employed for the custody of the palaces, without prejudice to the obligations and duties incumbent on those guards by reason of the laws in force in the realm.

Art. 4. There is preserved in favor of the Holy See the endowment of an annual revenue of 3,225,000 lire. With this sum, equal to that inscribed in the Roman balance sheet under this heading — Sacred Apostolic Palaces, Ecclesiastical Congregations, Secretariate of State, and the Diplomatic Service abroad,— it shall be understood that provision has been made for the support of the Sovereign Pontiff and for the various ecclesiastical needs of the Holy See, for the maintenance, ordinary and extraordinary, and the custody of the Apostolic Palaces and their dependencies; for the assignments and payments and pensions of the Guards mentioned in the preceding article, and of the officials of the Papal Court, and for eventual expenses; as also for the ordinary maintenance and custody of the museums and library, and for the assignments, stipends, and pensions of those who are therein employed.

The aforesaid endowment shall be inscribed in the Great Book of the Public Debt in the form of perpetual and inalienable revenue in the name of the Holy See; and during the vacancy of the Holy See this payment will be continued to supply all the needs peculiar to the Roman Church in this interval.

It will be exempt from every species of tax and State, communal or provincial burden; and it cannot be diminished even if the Italian government shall hereafter undertake the responsibility of providing for the expenses of the museums and library.

Art. 5. The Sovereign Pontiff, besides the endowment established in the preceding article, continues to enjoy (*continua a godere*) the Apostolic Palaces of the Vatican and the Lateran, with all the buildings, gardens, and plots connected with them, as well as the Villa of Castel Gondolfo with all its appurtenances and dependencies. The said palaces, villas, and annexes, as also the museums, library, and artistic and archeological collections therein existent, are inalienable and exempt from all taxes or burdens, and from expropriation on any ground of public utility.

Art. 6. During the vacancy of the Papal See, no judicial or political authority shall be able, for any reason whatsoever, to impede or limit the personal liberty of the Cardinals.

The government provides that the meetings of the Conclave and of ecumenical councils shall not be disturbed by any external violence.

Art. 7. No official of the public authority or agent of the public force can, in the discharge of his own office, enter the palaces or places of habitual residence or temporary stay of the Sovereign Pontiff, or in which is assembled a Conclave, or an ecumenical council, unless au-

thorized by the Sovereign Pontiff, the Conclave, or the ecumenical council.

Art. 8. It is forbidden to proceed to visits, perquisitions, or sequestrations of papers, documents, books, or registers in the papal offices or congregations that are invested with purely spiritual attributes.

Art. 9. The Sovereign Pontiff is perfectly free to accomplish all the functions of his spiritual ministry, and to post at the doors of the basilicas and churches of Rome all the acts of his aforesaid ministry.

Art. 10. Ecclesiastics who, by reason of their office, share in Rome in the issue of the acts of the spiritual ministry of the Holy See, are not liable, on account of these, to any molestation, investigation, or calling to account on the part of the public authority.

Every foreign subject invested with an ecclesiastical office in Rome enjoys the personal guarantees belonging to Italian subjects in virtue of the laws of the realm.

Art. 11. The envoys of foreign governments to His Holiness enjoy in the kingdom all the prerogatives and immunities which belong to diplomatic agents according to international law. To offences against them are extended the penal sanctions for offences against the envoys of foreign powers to the Italian government.

To the *envoys of His Holiness to foreign governments are assured, in the territory of the kingdom, the customary prerogatives and immunities,* according to the same law, in *going to and returning from the place of their mission.*

Art. 12. The Sovereign Pontiff may correspond freely with the episcopate and with the whole Catholic world, without any interference by the Italian government. For this purpose he can establish in the Vatican or in any other residence of his, post and telegraph offices, served

by employes of his own choice. The papal post office can send its correspondence in a closed packet directly to the postal offices of exchange of foreign administrations, or commit the same to the Italian offices. In both cases the forwarding of dispatches and correspondence bearing the stamp of the papal office shall be exempt from all tax and expense in the Italian territory.

Couriers sent in the name of the Sovereign Pontiff are regarded in the kingdom as on a level with the ministerial couriers of foreign governments.

The papal telegraph office shall be united with the telegraphic system of the kingdom at the expense of the State.

Telegrams despatched from the said office with the authentic qualification of papal, shall be received and sent on with the prerogatives established for State telegrams, and with exemption from all tax in the kingdom.

Telegrams to the Supreme Pontiff, or those signed by his order, which, bearing the stamp of the Holy See, may be presented at any telegraph office in the kingdom, shall enjoy the same advantages.

Telegrams addressed to the Sovereign Pontiff shall be exempt from the payments to be exacted from the receiver.

Art. 13. In the City of Rome, and in the suburbicarian sees, the seminaries, academies, colleges, and other Catholic institutions founded for the education and training of ecclesiastics, shall continue to depend solely on the Holy See, without any interference by the educational authorities of the realm.

These articles clearly prove that two vital elements are acknowledged by the Italian government: the sovereignty of the Pope, and the inviolability of his right of maintaining foreign relations. "The framers of the

act itself," said Mgr. Prior,[11] "and Italian statesmen generally have consistently held that, though the law is an Italian law, and imposes obligations chiefly on Italian subjects and in Italian territory, it has an international scope." Thus Mario Minghetti said in the Italian Parliament, January 24, 1871: "Since the Pope has relations with the whole world, since he is, and wishes to be considered, a sovereign not only by the Italian Catholics, but also by Catholics spread in every nation, we, gentlemen, cannot prescind from this situation, and we must place the Pope in such an eminent position that the idea that he may be a subject of the King of Italy cannot enter the mind of anyone." Senator Mameli said on April 21st, 1871: "The Pope holds the rights of a sovereign, not by the grace or concession of the kingdom of Italy, but because his sovereignty bears the seal of ages, is acknowledged by all the powers, either through solemn treaties, or by diplomatic relations, which are preserved even to-day; and this his right to sovereignty cannot be taken away from him by any act of violence." These utterances go to show that the Italian statesmen were profoundly convinced of the sovereign character of the Pope, that they sought to preserve, at least externally, the prestige due to the Vicar of Christ, in order not to give offence to the Catholic world. It certainly is interesting to hear an utterance of Bismarck, who had little scruples to foster the makers of Italia Unita. On April the 22nd, 1887, he said to the Prussian Chamber of Deputies: "As the representative of the government, I must take an independent point of view, and I must recognize that the Papacy is not an Italian institution, but a universal one. And because it is universal, it is also for German Catholics a German institution." Westlake, however (l.c., p. 39), seems to

11 See Laurentius, S. J., *Instit.*

think that "the position thus made (by the Law of Guarantees) for the Pope comprises along with much else, the exterritoriality enjoyed by the crowned head who visits a foreign country, but it is not a continuance of his sovereignty, . . . nor do the powers which receive his legates and nuncios and allow them their accustomed diplomatic rank thereby acknowledge him as a sovereign." We reply to that statement as follows: By no power was the occupation of the papal territory formally acknowledged. The European concert settled important matters in Turkey, Greece, Morocco, Congo, etc., but never touched the Roman question. The international position of the Apostolic See was neither created by the Italian Law of Guarantees nor by a congress of the various powers: it created itself, and therefore it needed no continuance. Westlake (*l.c.*) furthermore says: "The Pope is without either territory or subjects, for his palaces have not been excepted from the Italian conquest, and he is allowed only limited rights in them, and his guards and officers are not his subjects." This is historically untrue. For at the Act of Surrender, September 20th, 1870, the Vatican Palace, together with the *Città Leonina,* was explicitly exempted from the Italian occupation. And in that palace the Pope wields his power. His guards belong to him and obey his orders, as they are also paid by him; the Swiss Guard is ready to keep uncalled-for intruders aloof. No Italian officer enters the Vatican without the express request of its authorities.

We agree with Westlake and Geffken that "the Pope's position is quite abnormal," under the present conditions, which is not due to "the papacy being a unique phenomenon in history," but to abnormal circumstances which may and must be rectified. How it shall be brought about is a matter of speculation. But one thing is certain, that

the complete, unhampered independence of the Holy See must be guaranteed. Whether this is to be achieved by granting the Holy See a strip of land to be bought from the pittance granted by the Law of Guarantees and extending from the Vatican to the ocean, is a mere guess, though we have read of such a proposal in the newspapers. We would rather look forward to an international settlement. For if smaller nations are called upon to determine their own governments, it should not be impossible to find a juridical *modus vivendi* for the Pope.

Another point should be well decided, namely, the eventuality of war between Italy and some other power. This touches the representatives accredited to the Vatican by foreign governments. In 1915, when we were in Rome, and the entry of Italy into the war became imminent, the three ambassadors of Austria, Bavaria, and Prussia to the Holy See left the Holy City, despite the Law of Guarantees. This evidently betrays a gap (*lacuna*) in that famous law. Another point to be settled, although perhaps of a more internal character, yet touching a vital point of papal sovereignty, is the free appointment to bishoprics, which in one way or the other should be left to the Holy See. Connected with that matter is the free and unimpeded communication between the Papal Court and all pastors of the world. Hence the *regium placet* must fall. Finally, foreign missionaries must be guaranteed in their activity and safeguarded against unqualified internment.

Of course, the Italian government, if it grants to the Pope an outlet to the sea, must, on its part, be guaranteed that the wires and all means of communication be not abused in times of danger, that no political intrigues be concocted, and that peace and order be kept with due respect to the lawful authorities. These are a few points

that would have to be considered in case a settlement would be attempted on the basis of an international conference.[12]

What might be the *attitude of the United States towards he Apostolic See as an international person?* This may be guessed at from past records. "The New York *World* of December 22nd, 1920, is authority for the statement that a group of men, apparently Protestants, are anxious for an American envoy to the Vatican. The inspiration of this movement undoubtedly came, not from religious, but from political circles. Nearly all the civilized nations of the earth are now represented at the Court of the Vicar of Christ, not excepting England, which does not allow its Protestant bias to obscure the fact that the Vatican is the world's greatest religious and moral influence. Should the United States send a representative to the Pope, it will be in the way of resumption of diplomatic relations, under vastly different circumstances, it is true, from those that obtained in 1848, when our first representative went to Rome. In that year, Jacob L. Martin, of North Carolina, was appointed *chargé d'affaires* and died in office the same year." [13] By the act of March 27th, 1848, Congress made an appropriation for a *chargé d'affaires*. The instructions to this official contain the following passage: "There is one consideration which you ought always to keep in view in your intercourse with the papal authorities. Most, if not all, the governments which have diplomatic representatives at Rome are connected with the Pope as the head of the Catholic Church. In this respect the government of the United States occupies an entirely different position. It possesses no power whatever over the question of religion. . . . Your efforts will, therefore, be devoted exclusively to the culti-

12 *America*, New York, Jan. 1, 1921, p. 272.

13 See Appendix V, *infra*, "The Roman Question Solved."

vation of the most friendly civil relations with the papal government, and to the extension of commerce between the two countries. You will carefully avoid even the appearance of interfering in ecclesiastical questions, whether these relate to the United States or to any other portion of the world. It might be proper, should you deem it advisable, to make these views known, on some suitable occasion, to the papal government, so that there may be no mistake or misunderstanding on this subject." [13] This is honest language, conformable to our Constitution (Amend., art. 1). In 1866, the *chargé d'affaires* was instructed as to the possible change of sovereignty at Rome and told that, in that case, he should suspend the exercise of diplomatic functions within the territory in which a new government would be established. " Should the present [papal] government remove and take up a residence in any other place, whether in or out of Italy, you will not be expected to follow it until the case, as it shall then exist, shall have received the attention of the President, and until his views thereupon shall have been made known. In the case of such removal, you will either remain at Rome, or take up your temporary residence in some adjacent country, as in your discretion shall seem expedient." [14]

Of importance and interest is the mission of Ex-President *William H. Taft,* then Civil Governor of the Philippines, to Rome. Certain rules were laid down for his guidance, and it was expressly declared that his errand should " not be in any sense or degree diplomatic in its nature." [15] Interesting also is a paper of Judge

13 Mr. Buchanan, Sec. of State, to Mr. Martin, April 5, 1848; J. B. Moore, *A Digest of International Law,* 1906, Vol. I, p. 130.

14 Mr. Seward, Sec. of State, to Mr. King, Aug. 16, 1866; *ib.* p. 131. An American ship of war was, in accordance with the wish of the Cardinal Secretary of State, to be stationed at Cività Vecchia (*ib.*).

15 Moore, *l. c.,* Vol. IV, p. 447.

Baldwin on "The Mission of Gov. Taft to the Vatican," in the *Yale Law Journal,* Nov., 1902. In conclusion he says: "The whole proceeding . . . will rank in the history of international law as an anomalous one. The agent of the United States bore no credentials addressed to those with whom he was to negotiate. He was charged with certain affairs, but he was not a *chargé d'affaires.* . . . Nor could he properly be regarded as an agent to negotiate a concordat. A concordat, it is true, is an agreement to which the Pope becomes a party purely as the head of the Roman Catholic Church, and not at all in the character of a political sovereign. . . . Cardinal Rampolla's reception of Gov. Taft's overtures as coming from a political agent of the United States did not amount to recognition of him as a diplomatic agent, nor was he sent out in that capacity. It was, from first to last, to be classed in form as a military incident of a temporary state of hostilities; and yet it was from first to last, at bottom, the attempt of the civil authorities of the United States on the one hand and the Pope on the other to make a permanent settlement of a matter, essentially pertaining to affairs of civil government." [16]

This sounds like a clue to a *rapprochement* between the United States and the Vatican. The points are obvious: (1) Our constitution does not admit any diplomatic relation with the Pope which would, in any shape or degree, savor of politico-ecclesiastical interference or acknowledgment; (2) The former relations, from 1848 to 1866, were purely political or, let us say, commercial, based on the temporal sovereignty of the Pope; (3) The mission of Gov. Taft had no diplomatic character whatsoever, but (4) The possibility of considering a permanent connection pertaining to affairs of civil government is not entirely

[16] *Ibid,* p. 448.

excluded. Therefore, without stretching the "*ponderabilia*" of such a future relation, the reasons that might bring it about could be stated as follows: (1) The possibility of acquiring land titles affecting the Church, either directly or indirectly, *i.e.*, church property belonging to the Apostolic See or to private ecclesiastical corporations, the supreme authority over which belongs to the Apostolic See;[17] (2) The protection of American lives and American property belonging to Catholics who are citizens of the U. S.; this may especially be the case in missionary countries,[18] which need our support, not only from a religious and charitable, but also from a commercial, viewpoint; (3) The possibility or feasibility of entering the League of Nations, in which hypothesis, contact with the Apostolic See could hardly be avoided.

We believe that these are points which may soberly be considered, and we cannot, in proposing them, be accused of emotionalism, such as has now entered our legislation more than necessary, caused by the late war.

For the rest, as stated above, leaving the purely religious feature aside, and only taking the moral aspect, we believe that a relation of the United States with the Vatican would not create any disturbance in our political life, nor do violence to our Constitution. Bigots, of course, who are always ready with the bugaboo of the "Spanish Inquisition," but at the same time forget that we now have a whiskey or liquor inquisition, will fail to see the feasibility of a *rapprochement* with a moral power quite unique and universally acknowledged provided no foreign entanglement follows therefrom.

17 Can. 1499, § 2.

18 Here the question of colonies, or imperialism, would call for attention.

APPENDIX II

THE CHURCH IN THE UNITED STATES

The history of the Church in our own land has been ably written by *John Gilmary Shea,* from whose works [1] we cull the following. In the earliest period, when three great European nations laid claim to different portions of our territory, the history of the Church is to be traced in three different channels, descending from England, France, and Spain, and the different portions naturally reflected the politico-ecclesiastical conditions of the respective mother-countries.

The King of *Spain* was made the Pope's Vicar in America, the tithes were assigned to him, the nomination of bishops was in his hands, the support of the ministry and the missions devolved upon him. Portions of the royal revenue were then assigned by him to great religious works, and churches, convents, universities, and schools arose without direct contribution by the people.

France was Catholic, but the Church and the missions in the territories she controlled in America, were not supported by any governmental plan, this support being afforded by zealous individuals and pious colonists. But the impress of these colonies was of the French stamp, as still in effect in Canada.[2]

In the *English* colonies, except for two brief seasons,

1 *The Catholic Church in Colonial Days,* New York, 1886, Preliminary Remarks.

2 See Pouliot, *Le Droit Paroissial de la Province de Québec,* 1918.

Catholics were oppressed by laws copied from the appalling penal Code of England. The Church was proscribed, her worship forbidden, her adherents visited with every form of degradation, insult and extortion, and Puritan fanaticism was rank and rampant. This condition was not improved when, in 1763, England became the undisputed mistress of all the territory east of the Mississippi River. The Thirteen Colonies had their "constitutions," but only two of them had the courage to grant tolerance or a species of religious equality: they were Pennsylvania and Maryland. Others tell us that the old bigotry, so zealously taught from the pulpit of the minister and the desk of the schoolmaster, had not yet been rejected by the patriots of that era,[3] despite the Catholics' active and noble part in the Revolution.[4] But the dawn of liberty, notwithstanding the efforts of bigots and infidels, arrived. *Religious freedom* was read into the Constitution of the United States, submitted Sept. 17, 1787; in force April 30, 1789. There, under article 6, sect. 3, we read: *"No religious test shall ever be required as a qualification to any office or public trust under the United States."* Amendments, art. 1: *"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."* [5]

As is evident, art. 6, sect. 3, removes the odious test act imported from Great Britain, and implicitly admits Catholics to equality before the law. The first amendment strictly implies parity of religion and excludes any form of State religion; but it also involves separation of Church and State and guarantees freedom of exercising religion, by which was meant any Christian religion. For the

[3] J. G. Shea, *Life and Times of the Most Rev. John Carroll*, New York, 1888, p. 155 ff.; p. 252.

[4] See M. I. J. Griffin, *Catholics in the American Revolution*, 1911, 3 Vols.

[5] See A. B. Hart, *New American History*, 1917, p. xxx.

truth is that all the colonies in their separate constitutions had some form of the Christian religion in view.[6]

Three years before the Constitution of the U. S. was adopted, *John Carroll* had been appointed *Prefect Apostolic* of the U. S.; on Nov. 6, 1789, the Holy See "declared, created, appointed, and constituted the said John Carroll, *Bishop* and Pastor of the said Church of Baltimore." Ever since the Church in America has made such rapid progress that God's Providence appeared visibly to bless the country under the "Stars and Stripes." No doubt liberty, besides the material resources, helped to spread the Catholic religion and to set up the condition of Church and State in our country as the ideal of religious development, to be recommended also to European countries.[7] This enthusiasm is excusable on the plea of prior facts, but *not of principles*. To prove this latter part it must be observed:

1. That *separation supposes* either absolute or relative *indifferentism,* which is tantamount to either agnosticism or religious scepticism. This the Church cannot approve. We have arrived at such a stage in this country that three hundred or more so-called Christian denominations thrive lustily side by side with atheists, Buddhists, Theosophists, etc. To put the Catholic Church on a level with all these is more than her divine charter can admit.[8]

2. Such an assumption can only be *false or absurd*. For

a) It must deny the *spiritual order of men,* whose last end is in God, whilst the State only pursues, and that

6 This is also implied in George Washington's Address to the Roman Catholics in the U. S. of A.; see Shea, *l. c.*, p. 351.

7 See *Brownson's Works,* Vol. XII, 425 *et passim.*

8 We de not accuse the framers of our Constitution of any ill-will; it was under the prevailing circumstances a step towards liberty wrung from a still rampant fanaticism.

exclusively, temporal prosperity and wealth, with little or no reference to the higher end.

b) It must arrive at a *perversion* of the *moral order,* for it must acknowledge the State as the source and origin of all right and morality; whilst the real foundation of justice and law is to be sought in the immutable, universal, eternal law.

c) It leads to the *subversion of the social order;* for if the knowledge of the Creator and His attributes and the destiny of man are only vague notions, or have no reality in the minds of men, the State will be unable to procure temporal weal and tranquillity, which is impossible without moral order. The moral order is impossible without God, and God is impossible without religion. And if God has revealed and proposed a religion, the State is not allowed to proclaim itself indifferent. We need go no further.

But even a *relatively indifferent State, i.e.,* one which acknowledges only the Christian denomination,[9] would finally lead to atheism, tyranny, and anarchy. To *atheism,* because the road to that, and the surest one, is indifferentism; for if the State thinks itself independent of a fixed creed, it will feel and make itself independent of God. It leads to *tyranny,* because the State, being independent, will not refrain from making laws which do violence to the conscience of convinced Christians. Just think of divorce laws, of school laws, etc. To *anarchy* it must lead, since error and truth, good and evil, are left for individuals to decide upon.[10] And the individual choice

9 Christianity indeed is a part of *our* common law in "this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public"; C. Zollmann, *American Civil Church Law,* 1917, p. 15.

10 See D. Emmanuel de la Peña et Fernandez, *Ius Publicum Ecclesiasticum,* Hispali, 1900, Vol. I, p. 444 ff.

will incline to self-determination and self-assertion, as some of our pampered children prove.

Not without reason, therefore, was the doctrine in question proscribed by Popes Gregory XVI and Pius IX, by the former in the Constitution "*Mirari vos,*" Aug. 15, 1832, whilst the Syllabus n. 55 condemns the proposition: "The Church must be separated from the State, and the State from the Church"—the well-known phrase of Cavour and Montalembert.

A practical conclusion may be added. *Separation of Church and State may under certain conditions be admitted, and even proposed and protected.*[11] That such conditions are prevailing in the United States cannot be denied. But it also must be stated that separation is the least a body of more than fifteen million worshippers, patriotic as well as charitable, religious and honorable, can expect.

This calls for a last remark. Article 1 of the amendments to the Constitution forbids Congress to make laws "prohibiting the free exercise of religion." Now the exercise of the Catholic religion demands that its members may worship according to the norms laid down by the Church. Therefore, to speak concretely, the exercise must be made according to the Code. Consequently, the Church is entitled to see her Code respected. On the other hand, the Code respects the civil law wherever it concerns merely temporal matters, such as contracts, civil effects of marriage, etc. Free exercise means that the State is bound to proceed against all who would hinder it. For a merely negative prohibition is a farce and a "scrap of paper." As to the meaning of this enactment of article 1 of the Amendments, its intention is "to allow everyone under the jurisdiction of the United States to

11 See Laurentius, S. J., *Institutiones Iuris Ecclesiastici,* 1903, p. 650, n. 974.

entertain such notions respecting his relations to his Maker and the duties they impose, as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship, as he may think proper and not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect." [12] It is, says Zollmann, a restraint on the action of Congress, and is not a restriction on the action of the various *State legislatures*. The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws.[13] Logically we cannot speak of an ecclesiastico-civil legislation in our country. The Church, or rather the single ecclesiastical corporations, fall under the American civil law, which varies in various States as to details. Their main features are summarized as prohibiting:

(1) any law respecting an establishment of religion;
(2) compulsory support of religious instruction;
(3) compulsory attendance upon religious worship;
(4) restraints upon the free exercise of religion;
(5) restraints upon the expression of religious belief.[14]

But the States also offer a certain amount of protection, without which, as stated above, liberty of religion would be a farce. For the duty of the State to protect religious liberty is not merely negative, it is also positive.[15] This is evident from the laws regarding corporate property, upholding the tranquil exercise of religious worship, protection of organized societies, concerning pastors, parsonages, cemeteries, pews, etc. The limits of this protection are thus stated in one judicial opinion:

"Absolute religious freedom is thus guaranteed, un-

12 Zollmann, *l. c.*, p. 9.
13 *Ibid.*
14 *Ibid.*, p. 10.
15 *Ibid.*, p. 23.

restrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated." [16]

It must be noted, furthermore, that the *Roman Catholic Church as such is not recognized* by the courts as a corporation in our States, whilst it is recognized as such in our island possessions, by the treaty of Paris. Therefore, as far as these, *viz.*, the Philippines, Porto Rico and other territory, are concerned the Roman Catholic Church, with the Pope at Rome as its president, will be recognized by all the branches of the government as a corporation.[17]

The fact that the Catholic Church is recognized in our States only in its single ecclesiastico-juridical persons or corporations, but not as a body politic, is the logical consequence of the separation of Church and State and brings with it a certain *independence on the side of the Church towards the State, as such.* The Church, as such, need not exercise or execute any civil rights which the State would claim in case of union, for instance, in the observance of legal holidays, marriage impediments not in keeping with her own impediments,[18] school regulations, rules on health and hygiene. Neither is the Church obliged to offer any prerogatives or privileges which a union of Church and State would involve, for instance, presentation, nomination to vacant sees, etc. Nor is she obliged to grant any honorary rights or preference to the civil magistrates, for instance, special seats in church and honorary titles.[19] But the Church must see to it that the civil laws, as far as they do not violate her Constitution or the divine-

16 *Ibid.*, p. 12. We may be permitted to draw an inference: magazines and papers of the *Menace* type, being a real menace to public peace, have no right to exist.

17 *Ibid.*, p. 47 f.

18 See can. 1080; can. 1508; can. 1529.

19 Schulte, *System des allgemeinen Kath. K.-R.*, 1856, p. 435.

natural law, and do not trespass upon the conscience of individuals, as far as sin is implied, are scrupulously observed, that all the duties of a patriotic citizen are fulfilled. The Church, according to the exhortation of St. Paul,[20] shall also offer prayers and supplications for the welfare of the country, that all may lead a quiet and peaceful life. This, then, is the legal and actual relation in our country, with which, so far, the Church has had no reason to be dissatisfied.

The *following does not strictly belong to this topic,* but may be proposed here because it concerns the Church and the hierarchy, especially of the United States. But it is and must be understood as a strictly internal or private affair. More than one prelate of our country has asked: *What are our faculties now since the Code has taken effect, i.e., since May* 19, 1918? It is not our intention to dictate to the hierarchy, but merely to add a few remarks to what Dr. J. T. Creagh has very ably set forth in *The Code of Canon Law and the Church in the United States.*[21] He remarks that the French and Spanish settlements, or the laws by which these were governed, left little or no trace upon our Church law. Our real beginning is with the synod called by Bishop Carroll, Nov. 7, 1791. Here we have our first code of American Church law. But more especially was the American Church governed by the enactments of the seven provincial councils of Baltimore, held in 1829, 1833, 1837, 1840, 1846, 1849, and the three plenary councils, also convened at Baltimore, in 1852, 1866, and 1884. If we try to form a general appreciation of the strictly legal contents of our councils, we find, of course, much that has a local flavor, much that

20 I Tim. 2, 1 f.

21 We hope to commit no indiscretion if we make use of this excellent essay because it appears to have been intended for public use, although "printed for the First Annual Meeting of the Hierarchy," Washington, D. C., 1919 (copyrighted).

relates to our specific conditions,— laws on the holding of Church property, on trustees, on Catholic schools, on the proposal of candidates for the episcopate, on home missions, on the admission of priests from abroad, on the status of our parishes and pastors, on the organization of dioceses, on procedure, etc. The "common law" of the Church was by no means discarded or disowned. On the contrary, the Fathers of the Councils took it for granted that back of all their enactments lay the great repository of the *ius commune*. This was brought home to us when Pius X, in his Constitution "*Sapienti consilio*," June 29, 1908, classed the *United States among the countries governed by common law,* thus withdrawing them from the Propaganda and placing them under the authority of the *S. Consistorial Congregation.* But even before that time, general laws or decrees were not ignored by our bishops, although new laws came thickly after the year 1908. The *Code,* then, did not come as an entirely unexpected surprise to our distant shores or *regiones dissitae.* It *is law for us, and its faithful observance is committed to the care and vigilance of our bishops.*

However, besides the enactments of the ten councils and the sources of common law,— which, being dispersed and scattered through many sources could easily be ignored,— there was another source of great importance from the practical point of view, namely, the *faculties* and *indults* received from time to time. No one, of course, would call these laws in the strict sense. But they amounted to law, determining in certain matters our status in regard to obligations or duties, in others habitually vesting bishop or priest with special, needed powers. The faculties were granted for a shorter or a longer period, and indults were even given for an indefinite time.

Faculties are here identical with delegated power con-

ferred by the lawful superior, *i.e.*, the Pope, on the Ordinaries who, in virtue of their office, would not enjoy the exercise of the rights thus conferred. If we identify faculties with delegated power, no attempt is made to deny the nature of *privileges* attached to them. But this character lies more or less in every delegation. Note must, however, be taken that faculties, being, as can. 66 clearly supposes, of the species of privileges, the interpretation governing privileges must be applied to them, as well as the mode of acquisition. But *faculties cannot be acquired by custom* for the reason that, though given habitually, they are renewed from time to time, this renewal breaking up the time required as well as the will to establish a custom. This undoubtedly is one of the reasons why faculties are granted only for a short time. Of course, the power delegated by faculties may be acquired by custom, provided the requirements of custom are verified.

We said, the rules of *interpretation* regarding privileges must be applied to faculties, wherefore can. 68, respectively can. 50, are to be consulted. But special attention must be paid to can. 4, which directly refers to privileges and indults granted by the Apostolic See. If these are still in use and have not been expressly revoked in the Code, they remain intact.

Here is the key to the method of handling the faculties formerly granted. The term "*in usu*" has little to do with faculties, because as long as they are not expired, they are always in use. It refers to privileges proper and indults granted for an indefinite time. *Revocation,* on the other hand, is especially connected with the matter of faculties. Can. 4 mentions a twofold revocation through the Code itself.

a) The faculties or privileges expressly *revoked by the*

Code are the following, as far as Ordinaries are concerned:

1.° The right of the Ordinary to have two companions when making the canonical visitation, which right cannot be attacked by any custom or privilege, can. 343, § 2.

2.° The right of the Bishop to confer all the benefices and canonicates, except the dignities in cathedral and collegiate churches, can. 403 (as above).

3.° Only one priest can rule the same parish as actual pastor; can. 460, § 2.

4.° In every parish church a baptismal font must be kept; can. 774, § 1.

5.° The necessary jurisdiction for validly and licitly hearing the confessions of Sisters is to be obtained from the local Ordinary; can. 876, § 1.

6.° No one may consecrate or bless a sacred place without the consent of the Ordinary; can. 1157.

7.° No contrary privilege or custom is permitted to prevail against the payment of the *seminaristicum;* can. 1356, § 1.

8.° No custom or privilege may prevail against the law prescribing a board of three or five judges to decide the cases mentioned in can. 1576, § 1.

Now, as far as the former faculties are concerned, if we remember right, there was nothing contained in them to that effect, so that these faculties are really untouched by the canons cited.

b) But the Code records another revocation which we call *special, viz.,* that issued by the one who granted the faculties. This revocation was made explicitly by two decrees of the *S. Congregatio Consistorialis* of April 25, and Aug. 2, 1918. There a distinction is drawn between faculties granted *pro foro externo* and faculties granted

by the *S. Poenitentiaria pro foro interno.* What this distinction implies is generally known. For the external forum concerns directly and proximately the public and social order of the Church and supposes the exercise of jurisdiction with regard to the politico-religious body. Hither the whole administration and government of the Church, as such, belongs. However, it must be observed that, on account of the dual character of the members of the Church whose conscience is bound individually as well as politically, *i.e.,* as members of that public society, it is evident that the jurisdiction *in foro externo* affects also the consciences of the faithful. Hence it is, for instance, that absolution from censure given in the external forum is valid also for the internal forum (can. 2251). The *internal forum,* then, regards the individual as such and his relation to God. Hence jurisdiction and faculties granted for the internal forum are intended chiefly and directly for the spiritual benefit of the individual faithful, and only secondarily for public utility.[22] The internal forum embraces the sacramental forum, *i.e.,* the Sacrament of Penance, as well as the non-sacramental or internal forum, simply so-called. For the conscience may be reached not only by means of the Sacrament of Penance or absolution, but also by the application of sacramentals, indulgences, and dispensations of various kinds, although these last-named seem to fall under the legislative power of the Church. Yet there are dispensations which are meant for and imparted only to individuals for their private use. Hence the S. Poenitentiaria is said to be competent to grant favors, absolutions, dispensations, commutations, condonations, for the internal forum only, and to judge the whole use and grant of indulgences.[23] Dispensations from private vows (see can. 1309, 1313), from

22 See C. S. Berardi, *Commentaria in Ius Eccl. Universum, l.* 1, *c.* 2, ed. Venet., 1778, Vol. I, p. 9 f.

23 Can. 258.

occult impediments (can. 1047), from occult irregularities (can. 990), may be imparted in the internal forum outside the confessional; thus also absolution from an occult censure (2251).

The decrees mentioned above have taken away *all the faculties pro foro externo* granted in virtue of the former formularies (Forma I, and Forma T). At the same time the S. Congregation allowed the bishops to make use of the old formularies until they have received due notice of the revocation. Besides it permitted the "*war faculties*" to be used six months after peace had been signed between the belligerent nations.[24] Consequently, as soon as the bishops have received due notice of the decree of April 25, and six months after the ratification of peace between the U. S. and Germany, *all the faculties contained in the old formularies cease,* as far as they have been granted *pro foro externo,* except the *quinquennial.*

Said decree, however, did not change anything in the condition of the faculties *granted by the S. Poenitentiaria pro foro interno.* If, then, our bishops have obtained these formularies from the *S. Poenitentiaria,* they may continue to use them and also subdelegate others, as far as the clauses permit.[25] Strange to say, *our bishops seem not to have asked for them.* Consequently the bishops of the U. S. are destitute of these latter faculties, and therefore must conform themselves to the Code, which liberally provides for occult and urgent cases, as here set forth.

1.° *Can.* 81, as we said in the second edition of Vol. V, on Marriage Law, may be applied in *matrimonial dispensa-*

24 S. C. Consist., March 4, 1919 (*A. Ap. S.,* Vol. XI, p. 120); cfr., our Commentary, Vol. V, p. 113 f.

25 Putzer, *Comment. in Facult. Apost.,* ed. 4, p. 6; p. 432 f.

tions: unless the Pontifical Commission should issue a contrary decision, or the S. Cong. Consist. should issue a new set of faculties.

2.° Concerning these *matrimonial cases,* canons 1043 ff. must be consulted, as explained in our Commentary.

3.° As to *irregularities* and dispensations in occult cases, see can. 990.

4.° With regard to *vows reserved to the Apostolic See,* can. 1309 and 1313 must be consulted. Concerning public or *religious vows,* can. 647 and 648 must be inspected, if temporary vows are concerned; respecting perpetual vows, can. 649 ff. indicate the course to be taken.

5.° In *cases reserved* without censure the matter is settled by can. 900.

6.° In matters of *ordination* the Code is liberal with regard to interstices (can. 978), and the time of ordination (can. 1006). At the same time the last-named canon *rejects any contrary custom,* wherefore it would not be wise — to use a mild term — to employ the old faculties. Thereby we do not wish to create a prejudice to the privileges (can. 614) granted to exempt religious. For these remain in force until the Holy See has decided otherwise.

7.° Absolution or dispensation in *penal matters, i.e.,* censures and vindictive penalties, is quite clearly established in can. 2237 and can. 2252-2254; also can. 2314.

These remarks, it may be hoped, will be helpful in solving the puzzle of the actual status of faculties and their relation to the Code. The decree "*Proxima*" refers to several canons which contain matters formerly granted in the form of faculties, *e.g.,* can. 239 and can. 349 grant *personal privileges* to cardinals and bishops. But, being personal favors, these could not be communicated habit-

ually to others.[26] The privileges here mentioned for bishops are:

1. that of a portable altar everywhere, and to give permission for another Mass to be celebrated on it (can. 239, n. 7);

2. to celebrate on board a vessel under the usual precautions (n. 8);

3. to use their own (diocesan) calendar in every church or oratory (n. 9);

4. the use of a privileged altar (n. 10, and can. 916 f);

5. to gain all indulgences in their own private chapels (n. 11);

6. to bless the people everywhere except at Rome (n. 12);

7. to select and endow their own confessor with all the necessary faculties with regard to all cases except the four most especially reserved (can. 239, n. 1.);

8. to preach everywhere with the presumed consent of the local Ordinary (*ibid.*, n. 3);

9. to celebrate Mass privately on Maundy Thursday and Christmas (n. 4): unless he is obliged to celebrate in the cathedral;

10. to bless and attach indulgences to beads, crosses, medals, statues, scapulars, with the sole sign of the Cross (n. 5);

11. to erect the Stations of the Cross with one blessing and bless images or statuettes which take the place of Stations of the Cross.

These are now perpetual, but personal, privileges granted to bishops, residential and titular. But the Vicars-Apostolic, unless they are titular bishops *do not*

26 S. Poenit., July 19, 1919 (*A. Ap. S.*, XI, 333); this decision might have been foreseen if the nature of the privileges had been duly considered.

enjoy these privileges by virtue of their office. The Code (can. 294, § 1) only mentions "rights and faculties" they enjoy in their own territory. Hence they must obtain special faculties from the S. C. Propaganda.[27]

"*Proxima sacra*" also mentions other canons, which render faculties formerly required superfluous. Thus can. 468 and 914, concerning the papal blessing *in articulo mortis* and on certain solemn occasions; can. 806 and 822 with regard to bination and celebration of Mass outside a church or oratory; can. 1245, concerning fast and abstinence; can. 1304, concerning the blessing of *sacra suppellex,* render more than one so-called former faculty superfluous.

There remains the question concerning devotional articles, especially those endowed with indulgences: which the bishops may themselves bless in virtue of can. 349 and 239 and yet the faculty for the blessing of which they cannot habitually delegate. Therefore, recourse must be had to the S. Poenitentiaria.[28]

In concluding these remarks we once more return to the relation of the Code to our councils. Can. 5 of the Code *rejects all customs reprobated* by the canons of which mention was made above. *Centennial* and *immemorial customs* are admitted, or rather submitted to the prudent judgment of the Ordinaries. Are there such customs in our country? Some such customs are held to exist by authors of merit. Thus it was said that in virtue of a long-standing custom, *Holy Orders* could be conferred on *any day,* according to the good pleasure

27 The faculties of the Vicar-Apostolic of North Carolina contain several of these so-called privileges, nn. 28, 30, 47–50.

28 What we said in Vol. II, p. 592 we would emphasize here: things intended for the spiritual benefit of all should be accessible to all.

of the bishop.[29] However, this custom is expressly reprobated in can. 1006, § 5 and therefore has to go. Another custom extended the permission granted by an indult for Lent only to fast days outside of Lent.[30] There is no reprobating clause attached to the contrary law in the Code. Consequently, if it is an immemorable custom, it may be safely used. The difficulty really lies in the nature of the custom, whether or not the will of the people and authorities was intent on acting against the written law. The frequency of acts seems to point in that direction. It would be impossible to investigate every custom prevailing in our country.[31]

With regard to the written law, can. 6, n. 1, and can. 22 must be consulted. There is no doubt that our councils contain enactments which are opposed to the Code,[32] but there are other enactments which are not contrary to the canons. These latter, for instance, concerning church trustees, schools, revenues, pew rents, may be upheld.

It may serve to bridge over the transition period we live in to notice the distinction between more perfect, perfect, and less perfect laws. It stands to reason that greater care must be taken in observing laws to which an invalidating clause is attached, for instance, can. 150, can. 152, can. 154, can. 1427, can. 2347 (alienation), and the diriment impediments of matrimony. These laws are the so-called *leges plus quam perfectae* or *irritantes.* Next in line are the *penal laws,* of which Book V treats, and which are said to oblige directly and immediately to perform the act prescribed, or to omit a forbidden act, and oblige the transgressor to accept the penalty. These laws, because chiefly referring to the public order of the

29 Putzer, *Comment. in Facult. Ap.*, ed. 4, p. 145, n. 99.

30 *Ibid.*, p. 297.

31 See, for instance, can. 813 on saying Mass without a server; our Commentary, Vol, IV, p. 151.

32 See Creagh, *l. c.*

Church, require the attention of the guardians of the ecclesiastical laws.

Less perfect laws, whether prohibitive or prescriptive, demand the application of the rules on obligation of laws in general, which need not be repeated. But toleration and application of these last-named laws is a matter left to the prudent judgment of those who enjoy jurisdiction in the external forum. Thereby we do not maintain that there is no grave obligation to observe even less perfect laws. For the effect of law is observance, and this obliges either *sub gravi* or *sub levi*, according to the matter and the intention of the lawgiver. From this obligation it follows that the law must be known, and be made known, and consequently that the necessary steps, either positive or negative, must be taken in order that the law may be observed.[88] Positive remedies would be meetings of bishops, synods, councils. Negative are those which remove impediments or obstacles that obstruct the observance of the law. Under this heading would fall wilful ignorance and the creation of difficulties which do not exist or can be easily removed. The good will and oft-repeated maxim of our hierarchy to follow the Apostolic See in all things is a guarantee that the Code will, perhaps within a space of time shorter than expected, be the exclusive law in our country — *sensim, sine sensu*.

88 See P. Maroto, *Institutiones Iuris Canonici ad Normam Novi Codicis*, 1918, Vol. I, p. 179 f.

APPENDIX III

Index Facultatum Quas, pro Locis Missionis Suae, Nuntiis, Internuntiis et Delegatis Apostolicis Penes Civitates Seu Nationes post Codicis Iuris Canonici Publicationem Tribuere SSmus Dominus Noster Decrevit Ceteris Abrogatis.

CAPUT I

FACULTATES ORDINIS GENERALIS

1. Facultas visitandi sive per se, sive per ecclesiasticum virum probitate, prudentia ac doctrina praestantem personas, loca et res, de quibus in can. 344, 512, 1382 Codicis in casibus tamen particularibus et non per modum generalis visitationis; dummodo visitatio ipsa necessaria et urgens videatur, Ordinarius impeditus sit vel negligens, et tempus non suppetat, recurrendi ad S. Sedem.

2. Conficiendi, sive per se sive per alium virum ecclesiastica dignitate exornatum, acta omnia seu processus, ut vocant, pro iis qui ad Episcopalem seu Archiepiscopalem dignitatem ab hac S. Sede sunt designati iuxta normas pro singulis nationibus datas.

3. Conferendi personis idoneis ea beneficia, de quibus in can. 1435, § 1, n. 1 et 3, servatis regulis ab Ap. Dataria datis vel dandis.

4. Absolvendi, iniunctis de iure iniungendis, tum in foro conscientiae, tum etiam in foro externo, pro casuum di-

1 His Excellency, Most Rev. *John Bonzano*, Apostolic Delegate at Washington, D. C., has kindly granted us permission to insert these *Facultates* in this edition of Vol. I; for which we wish to express to him our sincere thanks.

versitate, ab omnibus censuris a iure sive simpliciter sive speciali modo Romano Pontifici reservatis.

5. Dispensandi pro iam ordinatis ad effectum tam Missam celebrandi, quam consequendi et retinendi beneficia ecclesiastica, super quibuscumque irregularitatibus tum ex delicto tum ex defecto provenientibus, dummodo exinde scandalum non oriatur, nec divinis pariatur impedimentum, iis semper exceptis de quibus in can. 965, n. 4 et praevia abiuratione in manibus absolventis, quando agitur de crimine haeresis vel schismatis.

6. Indulgendi ex causa paupertatis, iis qui Missarum sive manualium sive fundatarum applicationem omiserint, ut quoad praeteritum tempus obligationem suam paulatim adimplere valeant, ita nempe ut faciant quantum possint pro integra satisfactione oneris Missarum quo gravantur, celebrando vel per se vel per alium singulis mensibus aliquem missarum numerum, iuxta eorum vires, de bono et aequo a concedente, et, in casibus occultis, a confessario determinandum.

Moneantur autem praedictarum omissionum rei, si ita faciendo ante completam huiusmodi satisfactionem obierint, nec habeant quid pro eodem onere sive in toto sive in parte adimplendo relinquant, Missas quae post eorum obitum celebrandae supererunt, ipsis, dum pie in Christo decedunt, condonatas fore censeri, defectum quemcumque tunc supplente Sancta Sede de thesauro Ecclesiae.

Item concedendi, si in aliquo casu ob peculiaria omnino rerum adiuncta expediens in Domino videatur, ut ad certum numerum iuxta vires petentis Missae, quoad praeteritum pariter tempus, reducantur, dummodo non agatur de recidivis, supplente pariter Sanctitate Sua reliquarum Missarum defectum de Ecclesiae thesauro.

7. Admittendi in foro interno eos, qui beneficiis ecclesiasticis etiam cum cura animarum instructi recitationem

horarum canonicarum omiserint, ad discretam compositionem, eaque mediante fructus male perceptos condonandi, pecuniis exinde redactis in pia opera arbitrio Sedis Apostolicae erogatis.

Pauperibus autem, quorum inopia compositionem non admittit, praedicti fructus condonandi, iniuncta pro eorum viribus eleemosyna, pro suo vel confessarii prudenti iudicio determinanda.

Et haec quidem, sine praeiudicio illorum, quibus distributiones accrescere vel non decrescere debent, sint et censeantur ordinata.

8. Condonandi in foro interno fructus ex beneficio ob simoniam realem invalide obtento indebite perceptos, iniuncta congrua poenitentia salutari, cum aliqua eleemosyna iuxta vires poenitentis taxanda, et imposita eiusdem beneficii dimissione. Quatenus vero ob iustas et rationabiles causas beneficium dimitti non expediat, praesertim vero si idem parochiale sit, et non adsint qui parochiis praefici possint, titulum ipsius beneficii convalidandi.

9. Absolvendi vel per se vel per alias idoneas ecclesiasticas personas a se deputandas eos omnes qui fundos olim ecclesiasticos et a plurimis annis Ecclesiae per civiles leges ablatos nunc possident, vel titulo haereditatis a suis maioribus accepto, vel titulo emptionis seu similis contractus cum tertiis possessoribus initi, eosque singulos habiles reddendi ad praedictos fundos tamquam proprios licite habendos, de iisque tam inter vivos, quam mortis causa libere disponendi, imposita pro una vice tantum congrua eleemosyna iuxta prudens absolventis judicium, favore alicuius Ecclesiae vel pii operis eroganda.

10. Dispensandi, quando ita in Domino expedire videbitur, super lege abstinentiae, diebus praescriptis, etiam tempore ieiuniorum et quadragesimae, in casibus particularibus.

11. Permittendi clericis et religiosis, uti singulis, ut rationabili de causa quocumque anni tempore, privata matutini cum laudibus recitatio anticipari possit statim post meridiem.

12. Commutandi, ob visus debilitatem vel ob aliam iustam causam, eaque durante, obligationem recitandi horas canonicas in quotidianam recitationem integri rosarii B. M. V., vel aliarum piarum precum quae congruae sint, citra exemptionem a choro, quatenus is qui commutationem obtinuit ad illum accedere teneatur.

13. Dispensandi, in casibus urgentibus, a gradibus academicis ad assequendas praebendas canonicales, quae ex lege fundationis ipsos gradus requirant, dummodo nullum praeiudicium aliorum iuribus inferatur.

14. Concedendi ad normam Const. *Officiorum et munerum* facultatem retinendi ac legendi prohibitos libros et ephemerides, cum cautelis et sub limitationibus quae necessaria vel utilia in singulis casibus videbuntur, et in usu penes S. Congr. S. Officii sunt.

15. Commutandi aut dispensandi, consideratis causis, omnia vota simplicia private emissa, etiam Apostolicae Sedi reservata, exceptis votis in quibus agitur de tertii praeiudicio.

16. Dispensandi ex iusta causa a quovis iuramento, dummodo tertii praeiudicium non adsit.

17. Remittendi seu condonandi, *pro foro conscientiae tantum,* delinquentibus pauperibus partem aliquam male ablatorum, aut retentorum, quando domini incerti sunt et casus occulti; ita tamen ut residuum, si quo adsit vel aliqua alia summa vel pars pro viribus taxanda pauperibus loci distribuatur vel in pia opera eiusdem loci, si fieri possit, distribuatur.

18. Recipiendi, aut delegandi in singulis casibus alium idoneum ecclesiasticum virum, ut recipiat denuntiationes

de crimine sollicitationis, servatis in omnibus forma et tenore Instructionis quae a S. Officio danda erit.

19. Prorogandi ad breve aliquod tempus facultates, indulgentias et indulta a S. Sede concessa, quae expiraverint quin tempestive postulatio pro eorum prorogatione ad S. Sedem missa fuerit, facta tamen obligatione statim recurrendi ad eamdem S. Sedem pro gratia aut (si petitio iam facta fuerit), pro responsione obtinenda.

CAPUT II

FACULTATES CIRCA INDULGENTIAS

20. Concedendi sexies in anno, occurrente aliqua solemnitate, plenariam Indulgentiam omnibus utriusque sexus Christi fidelibus, qui vere poenitentes et confessi ac Sacra Communione refecti Ecclesiam vel publicum Oratorium visitaverint, ibique ad mentem Summi Pontificis aliquo temporis spatio oraverint.

Fidelibus vero qui in loco habitent, ubi impossibile vel difficile admodum sit confessarii copiam habere, concedendi, ut praedictas Indulgentias lucrare valeant, dummodo actuali sacramentorum susceptioni pium aliquod opus substituant, ac corde saltem contriti firmiter proponant admissa confiteri quam primum poterunt.

21. Impertiendi ter in anno et non in eodem loco, diebus a se eligendis, benedictionem papalem iuxta formulam typis impressam atque insertam, cum indulgentia plenaria ab iis lucranda, qui vere poenitentes, confessi et Sacra Communione refecti eidem Benedictioni interfuerint, Deumque pro S. Fidei propagatione et S. R. Ecclesiae exaltatione oraverint.

22. Concedendi pariter, non tamen in perpetuum, sed ad tempus sibi bene visum, omnibus Christi fidelibus contritis et confessis ac Sacra Communione refectis indulgentiam plenariam in Oratione 40 Horarum, quoties in anno a respectivis locorum Ordinariis indicatur, etiamsi, ex rationabili causa, in aliquibus non servetur Instructio Clementina.

23. Item concedendi plenariam indulgentiam primo conversis ab haeresi et ad sinum Catholicae Ecclesiae redeuntibus, in actu eorum conversionis.

24. Concedendi in casibus particularibus vel ad tempus indulgentiam plenariam occasione SS. Missionum, servatis consuetis regulis.

25. Declarandi privilegiatum quotidianum perpetuum in qualibet ecclesia territorii suae iurisdictionis unum altare ad tramitem can. 916.

26. Concedendi bis centum dies de vera indulgentia omnibus praesentibus in sacris functionibus a se peractis, durante munere.

27. Erigendi Sacras Stationes Viae Crucis cum applicatione indulgentiarum, et pia sodalitia Rosarii, B. M. V. de Monte Carmelo, et Septem Dolorum; cum facultate communicandi huiusmodi facultatem ecclesiasticis viris pro suo prudenti arbitrio; sub lege tamen et conditione ut haec facultas non exerceatur ubi coenobia adsint religiosorum, qui ex apostolica concessione eiusmodi privilegiis gaudent.

28. Concedendi ut indulgentiae, de quibus in praecedentibus articulis, applicabiles etiam sint per modum suffragii animabus in Purgatorio degentibus.

CAPUT III

FACULTATES CIRCA MATRIMONIUM

29. Dispensandi ab impedimentis impedientibus de quibus in cap. III, tit. VII, lib. III Codicis servatis ad unguem regulis ibidem positis, praesertim quoad dispensationes ob mixtam religionem, et docta, quotannis ante Pascha, S. Congr. S. Officii de numero aliisque adjunctis dispensationum, quae anno praecedenti circa mixtam religionem datae sunt.

30. Dispensandi pro *centum* vicibus ex gravi causa ab omnibus impedimentis dirimentibus matrimonium, juris tamen ecclesiastici, sive publicis sive occultis, sive minoris sive maioris gradus, iis tamen exceptis quae ex affinitate in linea recta consummato matrimonio, ex ordine sacro et solemni professione religiosa proveniunt.

Quo vero ad impedimentum dirimens disparitatis cultus, fas non sit dispensationem concedere nisi servatis iis quae in canonibus 1060–1064 praescripta sunt, et quoad matrimonia cum hebraeis vel mahumedanis, dummodo constet de status libertate partis fidelis ad removendum periculum polygamiae, absit periculum circumcisionis prolis, et si civilis actus sit ineundus, sit tantum caeremonia civilis nullaque Mahumetis invocatio aut aliud superstitionis genus interveniat.

Nupturientes aliquam oblationem, si fieri potest juxta vires persolvant, quam ipse Nuntius, Internuntius vel Delegatus Apostolicus, transmittet ad S. Congregationem S. Officii, si agatur de impedimento disparitatis cultus,

aut ad S. Congregationem de disciplina Sacramentorum, si agatur de aliis impedimentis.

31. Sanandi in radice pro *quinquaginta* vicibus matrimonia nulla ob impedimentum dirimens, de quo in numero 30, quando moraliter impossibilis est renovatio consensus modo ordinario, monita parte impedimenti conscia de sanationis effectu. Rescriptum vero hujusmodi sanationis in Curia Episcopali diligenter custodiatur, quo omni tempore et eventu de matrimonii validitate et de prolis legitimatione constare possit.

Sed si matrimonium fuerit nullum ob defectum formae, danda non erit sanatio nisi in casu quo altera pars renuat renovare consensum juxta formam, aut, si id ab ea exigatur, grave immineat alteri parti malum vel periculum.

Quod si matrimonium fuerit nullum ob non servatam formam in casu mixtae religionis aut disparitatis cultus, et pars acatholica induci non possit ad renovandum consensum iuxta leges Ecclesiae, danda non erit sanatio in radice, nisi assumptis a parte fideli obligationibus curandi pro viribus conversionem coniugis et educationem prolis in fide catholica, concessa eidem absolutione a censuris, si coram acatholico matrimonium attentaverit, ipsaque monita de gravi patrato scelere.

CAPUT IV

FACULTATES CIRCA CETERA SACRAMENTA ET SACROS RITUS

32. Deputandi simplices sacerdotes probatae doctrinae ac virtutis pro administrando sacramento Confirmationis in iis regionibus dumtaxat in quibus Episcopi desunt, servatis praescriptis can. 781, § 1; 782, § 4, et 784; idque ad tempus aliquod determinatum.

33. Permittendi singulis vicibus, vel ad tempus, Feria V in Coena Domini unicam missam lectam in Oratoriis publicis.

34. Concedendi sacerdotibus infirmis, durante infirma valetudine, aut aetate devexis indultum Oratorii privati, in quo missam celebrent servatis canonicis regulis.

35. Concedendi pro sacerdotibus suae iurisdictionis usum comae adscitiae tempore celebrationis Missae, data vera eorum necessitate.

36. Concedendi in casibus particularibus indultum celebrandi extra ecclesiam et oratorium, et erigendi altare sub dio et rationabili causa, ad tramitem can. 822, § 4.

37. Permittendi sacerdotibus navigantibus sive in mare sive in fluminibus, ut in navi Missam celebrare possint super altare portatili dummodo locus in quo Missa celebratur nihil indecens aut indecorum praeseferat et periculum absit calicis effusionis.

38. Consecrandi sive per se, sive per simplices presbyteros a se deputandos altaria, tum fixa tum portatilia, quae ex aliquo defectu pristinam consecrationem amiserunt, servatis tamen omnibus in Instructione S. Rituum Con-

gregationis ad rem in *Ritu et formula breviori praescriptis.*

39. Indulgendi, ex rationabili causa, in casibus particularibus, vel ad tempus, ut sacrosanctum Missae sacrificium peragi possit a tertia hora post mediam noctem.

40. Indulgendi ad tempus in aliqua ecclesia bis vel ter in hebdomada, de consensu Ordinarii, Missa de *Requie* celebrari possit etiam diebus ritus duplicis, exceptis tamen festis duplicibus I et II classis, dominicis aliisque festis de praecepto servandis, nec non feriis, vigiliis, octavisque privilegiatis.

41. Concedendi presbyteris, ex utroque clero, visivae potentiae debilitate laborantibus, vel alia infirmitate detentis, facultatem celebrandi Missam votivam Deiparae Virginis, aut defunctorum, adhibita, quoties ea indigeant, alterius sacerdotis adsistentia, et firmo permanente onere, si sint parochi, explicandi Evangelium diebus praescriptis.

Item eamdem facultatem concedendi sacerdotibus omnino caecis, praescripta semper assistentia alterius sacerdotis, aut diaconi, et dummodo, facto experimento, comperiantur in nullo defecisse.

42. Concedendi infirmis decumbentibus de quibus certa spes non adsit ut cito convalescant, etiam ante finem mensis a quo decumbunt, ut S. Communionem sumere possint semel in hebdomada non servato ieiunio, hoc est, etsi aliquam medicinam vel aliquid ad modum potus antea sumpserint (can. 858, § 2).

Concedendi infirmis non decumbentibus, qui tamen tali morbo laborant, quo, iudicio medici, ieiunium sine discrimine servare nequeant, ut communionem, semel in hebdomada percipere valeant non servato ieiunio, ut supra.

43. Indulgendi per modum actus ut in ecclesiis, in quibus festum alicuius Sancti in *Martyrologio Romano* descripti, vel alias ab Apostolica Sede approbatum, solemniter celebretur, quod cum officio illius diei minime con-

gruat, dici possint tum Missa solemnis cum cantu, tum etiam Missae lectae de eodem festo, dummodo non occurrat duplex vel dominica primae classis, aut Vigilia Nativitatis D. N. I. C. vel Vigilia Pentecostes, vel dies octava Nativitatis D. N. I. C. (Circumcisio Dni.), dies octava Epiphaniae vel SSmi. Corporis Christi aut feria IV Cinerum, vel integra maior hebdomada.

44. Deputandi, in locis iurisdictionis sibi commissae, in casibus particularibus, vel ad tempus aliquem sacerdotem cum facultate *consecrandi*, iuxta formam in *Pontificali Romano* praescriptam, calices, patenas et altarium lapides adhibitis sacris oleis ab Episcopo catholico benedictis.

45. Benedicendi campanas et consecrandi ecclesias, monito tamen loci Ordinario eoque non renuente.

CAPUT V

DE FACULTATIBUS CIRCA RELIGIOSOS

46. Cognoscendi in casibus extraordinariis et urgente necessitate super statu alicuius domus Religionis cuiuslibet; conferendo cum Superioribus consilium et operam ut opportuna abusibus remedia adhibeantur, et Religiosi ad sui status perfectionem reducantur, certiore tamen facta quamprimum Apostolica Sede, si quid novi in utilitatem claustralium communitatum decernendum esse videatur.

47. Dispensandi iusta de causa postulante Communitate super defectu dotis in religione pro sororibus aut monialibus requisitae.

48. Concedendi in casibus particularibus, vel ad tempus, ordinariis Dioecesanis facultatem praeficiendi paroeciis Religiosos in defectu sacerdotum saecularium, de consensu tamen suorum Superiorum, et cum clausula ut saltem duo alii religiosi cum parocho cohabitent, servatisque in reliquis sacrorum canonum dispositionibus.

49. Indulgendi monialibus in casu infirmitatis, aliisque iustis gravibusque de causis, *ut extra claustra* per tempus prudenti arbitrio praefiniendum manere possint, ita tamen ut cum associatione et assistentia suorum consanguineorum vel affinium aut alicuius honestae mulieris semper incedant, domi et alibi vitam religiosam ducant a virorum frequentia semotam, prout Deo sacratas virgines decet, firmo praescripto can. 639.

50. Dispensandi religiosos utriusque sexus, *pro foro conscientiae tantum,* a regressu in religionem et permit-

tendi ut in saeculo remaneant quoties hi invalide obtinuerint declarationem nullitatis votorum, dummodo tamen haec invaliditas occulta sit, firmo semper manente voto castitatis perpetuae, servatisque aliorum votorum substantialibus usquedum peculiarem dispensationem a S. Sede hac de re assequantur et si sint sacerdotes, facta lege ut habitum sacerdotis saecularis induant.

CAPUT VI

FACULTATES PRO IPSO NUNTIO, INTERNUNTIO SEU DELEGATO

51. Recitandi divinum officium et missam celebrandi iuxta Kalendarium romanum pro clero Urbis; idque concedendi sacerdotibus secum commorantibus sibique subiectis.

52. Asservandi in sacello domus stabilis suae residentiae SSmum. Eucharistiae sacramentum, ea lege ut lampas indesinenter ante tabernaculum lucescat, clavis diligenter custodiatur, aliaque iuxta liturgicas leges plene serventur.

Sacellum autem ipsum ex Summi Pontificis venia qua publicum erit.

53. Administrandi sacramentum Confirmationis in ditione universa suae iurisdictioni obnoxia, nec non durante maritimo itinere tam in accessu quam in recessu a loco missionis suae.

54. Excipiendi sacramentales confessiones fidelium utriusque sexus in locis et in maritimo itinere, uti supra.

55. Lucrandi sibi indulgentias quas aliis vi facultatum sibi concessarum impertiendas censuerit.

Animadversio

1. Facultates, quae superius continentur in cap. II et III, et eae quae recensentur sub numeris 1, 3 et 18, cap. I; 32 et 38, cap. IV; 46, cap. V; et 53, 54, 55, cap. VI, non conceduntur nisi iis qui sunt charactere episcopali insigniti; ideoque ad eos, et signanter ad Auditorem vel

Secretarium, quibus durante Nuntiaturae, Internuntiaturae vel Delegationis vacatione negotiorum gestio fuerit commissa, non intelliguntur adtributae nisi expresse id dicatur, quamvis commissio regendi officium cum facultatibus ordinariis eisdem concessa sit.

2. Caveat Pontificius Administer ne indulta quae ad tempus concedere potest, ultra quinquennium vel decennium protrahat.

Datum Romae, die 6 Maii 1919.

C. Card. De Lai, Epis. Sabin., Secret.

V. Sardi, Archiep. Caesar., Assessor.

APPENDIX IV

THE ROMAN QUESTION SOLVED

(See pp. 235 ff.)

The *Acta Apostolicae Sedis* (1929, n. 6, pp. 209 ff.) published two very important documents referring to the long desired settlement of the difficulties which existed from Sept. 20, 1870, to Feb. 11, 1929, between Italy and the Holy See.[1] The Italian text contains two distinct pacts: I. the *Trattato* or Treaty between the Holy See and Italy, to which is attached the *Convenzione Finanziaria* or Financial Agreement, and II. the *Concordato* or Concordat.

I. The *Treaty* reasserts that the Roman Catholic religion is be the sole religion of the Italian State, as had been already laid down in the Constitution of 1848 (art. 1). The sovereignty of the Holy See, as acknowledged in the Law of Guarantees, is recognized anew (art. 2). The creation of the *Vatican City* is next determined and its limits are circumscribed (arts. 3–5).[2] Next the communications of the Vatican City with its neighbors are defined, *viz.*, water supply, railroads, telephone, telegraph, radio stations, airship, etc. (arts. 6–7). Art. 8 reaffirms the inviolability of the person of the Sovereign Pontiff, as affirmed in the law of Guarantees. The subjects of the Vatican City, their rights and privileges are then set forth (arts. 9–11). Then

1 An English translation—which, however, is not authentic—may be found in *Current History*, July, 1929, pp. 552 ff.; the French text in *Ius Pontificium*, 1929, pp. 7 ff.

2 It embraces the territory lying within the area bounded by the Vatican walls, the Via di Porta Angelica, the Piazza di San Pietro, the Via and Piazza della Sagrestia, and the Via Teutonica.

the diplomatic relations are defined (art. 12). Then the properties of the Holy See are fully outlined (arts. 13–18). A clear distinction is made between property that enjoys (a) extraterritoriality as well as exemption from expropriation and taxes, and (b) property that only enjoys exemption from expropriation and taxes. To class a) belong: The Lateran Church and Palace with adjacent buildings (Scala Santa), the Basilica of Santa Maria Maggiore with the adjacent buildings, the Basilica of St. Paul outside the walls with the adjacent buildings, the Palaces of the Pope and of the Barberini at Castel Gondolfo, the Palaces of the Dataria, Chancery, Propaganda, S. Callisto, dei Convertendi,[3] of the Holy Office (Via del S. Uffizio 5), of the Roman Vicariate, some property on the Gianicolo. To class b) belong: the old and new Gregorian University, the Biblical Institute, the Palace of the Twelve Apostles (Palazzo Colonna), the Palaces adjacent to the Church of S. Andrea della Valle and of S. Carlo ai Catinari, the Archaeological and Oriental Institutes, the Colleges of the Lombards and Russians, the Palaces of S. Apollinaris, and finally the Retreat House for the clergy at SS. Giovanni and Paulo (Monte Celio). The means of personal communication by diplomatic representations and the importation of merchandise into the Vatican City are regulated in art. 19 f., the honors due to cardinals in art. 21, criminal jurisdiction in art. 22 f. The three concluding articles deal with interference in international relations, whilst the last article (27) submits this treaty to ratification on both sides.

The *Financial Agreement* forms an integral part of the Treaty.[4] Thereby Italy obliges itself to pay 750,000,000 lire

3 As a historical reminiscence it may be permitted to point out that this building was the first habitat of the Collegio S. Anselmo since its reopening in 1888.

4 "Con una convenzione distinta, ma formante parte integrante del medesimo," viz., del Trattato; *A.Ap.S., l.c.*, p. 273.

at the time of the ratification of the Treaty (June 7, 1929) and at the same time to deliver to the Holy See negotiable bonds to the nominal value of one billion lire.

II. The *Concordat* reproduces features of former concordats (for instance, that with Austria in 1855), but more specifically considers the particular conditions of Italy. The fact is that the Concordat may be called a practical application of the Code of Canon Law to Italy. Most of its 45 articles settle questions according to that principle. Thus the military service of priests (art. 3), immunity, personal and real (arts. 4–10), preferments (art. 19 f.), corporate character of ecclesiastical and religious entities and institutes (art. 29 ff.), marriage (art. 34), education (art. 36 ff.), judiciary power, are set forth in accordance with the ecclesiastical law.[5]

Both Treaty and Concordat were signed on Feb. 11, 1929, in the Lateran Palace by Cardinal Gasparri, then Secretary of State, and Benito Mussolini, Premier of Italy. In the Vatican Palace the signature of ratification was added to both documents by the same personages on June 7, 1929.

Both documents certainly mark a great historical event, which has been differently rated by friends and opponents.[6] Exaggerations, however, should be avoided. Thus we cannot agree with the statement of Mr. Wm. F. Montavon: "By this [the Treaty] two closely related facts are established: the juridical personality of the Holy See and the equality of that personality with every other like personality. It establishes as of right as well as of fact the sovereignty of the Holy See." What we said above (p. 226 ff.) concerning the international position of the Holy See has not been

5 See can. 121, 137, 141, 152, 582, 1016, 1354 f., 1375, 2214.

6 The latter are pretty fairly stated in *Current History*, quoted above.

changed by the Treaty. What the Treaty has achieved may be summed up in this sentence: It has codified the sovereignty of the Roman Pontiff, as far as both high contracting parties are concerned; the Law of Guarantees was a one-sided or unilateral contract, the Treaty establishes a bilateral one. Until the League of Nations or some international conference recognizes this Treaty, it remains merely a two-Powers' juridical agreement.

The same is true, *a fortiori,* of the *Concordat.* Therefore the apprehensions of Mr. Charles C. Marshall [7] really concern Italy only, but no other nation or State. But even in Italy religious liberty is not destroyed. Non-Catholic sects are not mentioned in the Concordat at all. "Eternal damnation," which Mr. Marshall stresses so strongly, is not threatened in either document. What the Concordat claims for marriage and education is laid down in the Code of Canon Law and has been the teaching of the Church in every clime and at all times.

Both documents are the well matured fruit of long and laborious study, of reciprocal generosity, and juridical acumen. They honor the great mind of a noble nation.

[7] *Current History,* 1929, pp. 527 ff.

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Homiletic and Pastoral Review, New York.
Irish Eccl. Record, Dublin.
Jus Pontificium, Rome.
Theologisch-Praktische Quartalschrift, Linz, Austria.

The latest monthly publication, *"The Clergy Review,"* London, promises to be of interest also to Canonists.

Owen

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